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NOMINATION OF JAMES C. MILLER III

MF111

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

NOMINATION OF JAMES C. MILLER III TO BE DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET

SEPTEMBER 24, 1985

Printed for the use of the Committee on Governmental Affairs

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I

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NOMINATION OF JAMES C. MILLER III TO BE DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET

TUESDAY, SEPTEMBER 24, 1985

U.S. Senate,
Committee on Governmental Affairs,
Washington, DC.

The committee met, at 10:35 a.m., in room SD-342, Dirksen Senate Office Building, Hon. William V. Roth, Jr. (chairman of the committee) presiding.

Present: Senators Roth, Stevens, Cohen, Durenberger, Eagleton, Chiles, Glenn, Levin, and Gore.

OPENING STATEMENT OF CHAIRMAN ROTH

Chairman Roth. The committee will please come to order.

Senator Eagleton is in route but has no objections to my commencing with the hearing.

This morning, we are holding a hearing to consider the nomination of James C. Miller to be Director of OMB, and as you well know, Mr. Miller, the job to which you have been nominated is one of the most important and demanding positions in the Federal Government. As a key adviser to the President, you are in a position to greatly influence the successful development of national policy and the efficient and effective management of Federal programs.

I might say, you also have big shoes to fill. Your predecessor, David Stockman, made significant changes in the way the budget is put together. I think it is correct to say that Mr. Stockman devoted nearly all his time and energy to budget policy and became a very capable advocate of spending reform.

The budget rightly occupied center stage at OMB, and there is no doubt in my mind that the budget will continue to dominate your agency. The responsibility of the budget, however, must not be allowed to overwhelm OMB's very significant role in Government-wide management. Through the work of the Deputy Director of OMB, we have seen in recent years the emergence of an ambitious, wide-ranging management improvement initiative called Reform '88, and numerous legislative proposals to remove fraud and waste, improve productivity and make Government more cost-effective.

OMB has also made significant changes in the regulatory review process, which has had the impact of significantly reducing the number of regulations and altering the way the Government regulates private activity.

I know that regulatory reform is an initiative to which you have devoted considerable energy and attention over the years. As you well know, the approach that OMB has taken is not without controversy, and I am sure that this issue will receive close attention today and in the months ahead.

Our committee also has a strong interest in the structure and the organization of Government. I regret to say OMB has been less active in recent years on such issues. I trust and hope this will change. How the Government is organized is critical to its ability to effectively fulfill its responsibilities. I hope time will be found in the months ahead to look for ways to streamline the Federal Government.

Besides the issues I have already mentioned, OMB carries other heavy responsibilities in information management, paperwork reduction, procurement and intergovernmental relations. All of these will need your attention.

In summary, the efficient operation of Government programs is critical to any long-term success in controlling Federal spending and preserving the health of our Federal system.

Our committee will follow closely how you carry out your management and organizational responsibilities, and we look forward to working with you on these important matters.

Mr. Miller, I particularly want to welcome you and your family to this confirmation hearing today. I understand that your wife, Demaris; your daughter, Sabrina; your father and mother, Mr. and Mrs. James Miller; and your mother-in-law, Mrs. Humphries are here. Would you all please stand?

I know this is an important and wonderful day for all of you, and we welcome your being here today with Jim.

Mr. Miller, I would like to thank you for your cooperation with both the members of the committee and the staff. The committee rules require that the committee conduct an inquiry into a nominee's experience, qualifications, suitability, and integrity to serve in the position for which he or she has been nominated.

I will take a very brief time to recount for the record the steps that the committee has taken on this nomination prior to our hearing today.

First, Mr. Miller has been asked for and has cooperated in supplying financial statements and detailed information on education, employment, and professional achievements.

He has also responded in writing to a number of prehearing questions. Copies of the biographical information and the prehearing question responses will be placed in the record as a part of this hearing and are available upon request.

Financial statements are available for inspection by the public in the committee office. The committee reviewed the nominee's biographical and financial information, as well as reports submitted by the Office of Government Ethics and the general counsel at OMB. Following that, acting as the chairman of the committee, I reviewed the FBI report prepared on Mr. Miller, which has also been reviewed by the ranking minority member, Senator Eagleton.

[Mr. Miller's biographical information and responses to prehearing questions follow:]

A. BIOGRAPHICAL INFORMATION

1. Name: (Include any former names used.)

James Clifford Miller III

2. Position to which nominated:

Director, Office of Management and Budget

3. Date of nomination:

August 1, 1985

4. Address: (List current place of residence and office address.)

Residence:
3400 Ordway Street, N.W.
Washington, D.C. 20016
(202) 362-2227

Office:
Federal Trade Commission
Sixth & Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 523-3711

5. Date and place of birth:

June 25, 1942
Atlanta, Georgia

6. Marital status: (Include maiden name of wife or husband's name.)

Married to former Demaris Guest Humphries

7. Names and ages of children:

Katrina Demaris Miller (15)
John Felix Miller (14)
Sabrina Louise Miller (12)

8. Education: List secondary and higher education institutions, dates attended, degree received and date degree granted.

Rockdale County (Georgia) High School (1956-1960); H.S. Diploma (1960)

University of Georgia (1960-1965); B.B.A. in Economics (1964)

University of Virginia (1965-1968); Ph.D. in Economics (1969)

9. Employment record: List all jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment.

Listed below are jobs held since graduate school; not listed are odd jobs and teaching assistantships I held during the period 1964-1968.

Full-Time Positions:

Assistant Professor of Economics; Georgia State University; Atlanta, Georgia; September 1968 - December 1969

Senior Staff Economist; U.S. Department of Transportation; Washington, D.C.; December 1969 - February 1972

Research Associate; The Brookings Institution; Washington, D.C.; March 1972 - April 1972

Research Associate; The American Enterprise Institute for Public Policy Research; Washington, D.C.; May 1972 - July 1972

Associate Professor of Economics; Texas A&M University; College Station, Texas; August 1972 - May 1974

Senior Staff Economist; U.S. Council of Economic Advisers; Washington, D.C.; July 1974 - October 1975

Assistant Director (for Government Operations and Research); U.S. Council on Wage and Price Stability; Washington, D.C.; October 1975 - January 1977

Resident Scholar, Center for the Study of Government Regulation, American Enterprise Institute for Public Policy Research; Washington, D.C., January 1977 - January 1981; Co-Director of the Center, March 1977 - January 1981

Administrator, U.S. Office of Information and Regulatory Affairs, Office of Management and Budget; and Executive Director, Presidential Task Force on Regulatory Relief; Washington, D.C.; January 1981 - September 1981

Chairman; U.S. Federal Trade Commission; Washington, D.C.; October 1981 - present

Concurrent Positions:

Lecturer, George Washington University, Washington, D.C., September 1971 - May 1972; September 1975 - May 1976; and September 1980 - December 1980

President and Chairman of the Board; Economic Impact Analysts, Inc. (family-held Subchapter S corporation); Washington, D.C.; 1978 - present (dormant during term of government service -- i.e., since January, 1981)

10. Government experience: List any advisory, consultative, honorary or other part-time service or positions with Federal, State, or local governments, other than those listed above.

Consultant; U.S. Department of Transportation; Washington, D.C.; March 1972 - July 1974

Consultant; U.S. National Bureau of Standards; Gaithersburg, Maryland; January 1974 - June 1974

Consultant; U.S. National Science Foundation; Washington, D.C.; July 1977 - January 1981

Consultant; Pennsylvania Public Utilities Commission; Harrisburg, Pennsylvania; 1978

Consultant; U.S. Federal Trade Commission; Washington, D.C.; 1978 - 1979

Expert witness; California Public Utilities Commission; San Francisco, California; 1979

Consultant and expert witness; U.S. Civil Aeronautics Board; Washington, D.C.; 1980

Member of Council; Administrative Conference of the United States; Washington, D.C.; November 1981 - present

11. Business relationships: List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm partnership, or other business enterprise, educational or other institution.

President and Chairman of the Board of Economic Impact Analysts, Inc., a family-held Subchapter S corporation formed in 1978 and which has remained dormant during my term of government service (i.e., since January, 1981).

Limited Partner, L.P.D. Salt Lake Associates, a milk processing plant situated on 7.5 acres of industrial land in Salt Lake City.

Member of the Board of Directors of the Center for Regulatory Impact Analysis, Inc. (non-compensated; resigned January, 1981).

In addition, either directly or through my work for Economic Impact Analysts, prior to 1981 I provided consulting services, speeches, or writings to the following firms or organizations (asterisk denotes instances where total compensation exceeded $5,000):

Alliance for a Responsible CFC Policy

American Farm Bureau Federation

American Society of Travel Agents*

American Telephone and Telegraph Company

Arlington House Publishers

Brookings Institution

California Public Utilities Commission

Carborundum Company*

C&P Telephone Company

Clemson University

Clipper Exxpress, Inc.*

Dartmouth College

Duke University

DuPont de Nemours Company

Edison Electric Institute

General Accounting Office

General Electric Company

General Motors Corporation*

George Washington University

Greyhound Corporation

Grocery Manufacturers of America

JAI Press

Leviton Corporation*

Marsh Media, Ltd.*

Maryland - D.C. Utilities Association

McGill University

National Distillers and Chemical Corporation

National Music Publishers Association*

Parcel Post Association*

Pennsylvania Public Utilities Commission

Policy and Management Associates, Inc.

Public Interest

Public Interest Economics Center*

Rand Corporation

Readers Digest Association*

Small Business Administration

Society of Consumer Affairs Professionals

Texas International Airlines, Inc.*

U.S. Civil Aeronautics Board*

U.S. Department of Transportation*

U.S. Federal Trade Commission*

U.S. National Bureau of Standards

U.S. National Science Foundation

University of California at Los Angeles

University of Florida

Upland Freight, Inc.

Vistron Corporation*

Wall Street Journal

WGBH - Boston

Washington Campus Program

12. Memberships: List all memberships and offices held in professional, fraternal, scholarly, civic, business, charitable and other organizations.

Current memberships:

American Association for the Advancement of Science (with spouse)

American Bar Association (not being a lawyer I am not an official member of the association; but I do serve as the FTC representative to its Section of Antitrust Law)

American Economic Association

Cleveland Park Club (neighborhood association; Member of Board, 1980-1982)

Flattop Mountain Landowners Association

Metropolitan Memorial Methodist Church

National Cathedral School Tennis Club

Public Choice Society

Southern Economic Association (elected Member of Executive Committee, 1980-1982)

Memberships not current (omitting high school and college clubs, church groups, etc.):

American Radio Relay League (amateur radio)

Aviation Consumer Action Project (Member of Board of Advisors, 1978-1981)

Econometric Society

Graduate Economics Club, University of Virginia (President, 1966-1967)

Omicron Delta Epsilon (national honorary society in economics; President of University of Virginia chapter, 1967-1968; Faculty Advisor to Georgia State University chapter, 1968-1969)

Western Economic Association

13. Political affiliations and activities:

(a) List all offices with a political party which you have held or any public office for which you have been a candidate.

None.

(b) List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.

Member, Council on General Government, Republican National Committee, 1977-1980

Member, Reagan-Bush Task Force on Regulatory Reform, 1980

Member, Reagan-Bush Task Force on Transportation, 1980

Captain, Reagan-Bush Transition Team on Federal Trade Commission, 1980

Member, Reagan-Bush Transition Team (regulatory reform), 1980 - 1981

Presentations to and/or attendance at the various Republican events listed below:

Date	Event/Activity	Location
1/20/82	Republican National Committee (RNC) reception and dinner	Washington, D.C.

BEST COPY AVAILABLE

6/9/82	Fundraising reception for Senator John H. Chafee	Washington, D.C.
6/10/82	Breakfast fundraiser for Congressman Norm Lent	Washington, D.C.
3/3/83	Reception honoring Senator Phil Gramm	Washington, D.C.
4/14/83	Reception honoring RNC Chairman Frank Fahrenkopf	Washington, D.C.
5/11/83	Reception honoring Congressman Carroll Campbell	Washington, D.C.
5/12/83	1983 Republican House-Senate Dinner	Washington, D.C.
10/25/83	Reception for Congressman George O'Brien	Washington, D.C.
11/2/83	Reception for Congressman Norm Lent	Washington, D.C.
1/13/84	Local Republican Eagles meeting	Stamford, Conn.
4/3/84	Reception honoring Congressman Bill Lowery	Washington, D.C.
4/10/84	National Republican Eagles meeting	Washington, D.C.
4/10/84	Republican National Finance Committee Dinner	Mount Vernon, Va.
5/31/84	Local Republican Eagles reception	Birmingham, Ala.
6/20/84	Reception honoring Congressman George O'Brien	Washington, D.C.
7/30/84	Martin-for-Governor fund-raiser dinner	Greensboro, N.C.
9/17/84	Republican Senatorial Inner Circle Dinner	Washington, D.C.
10/18/84	Local Republican Eagles reception	Waterbury, Conn.

11/6/84	Election night receptions and parties hosted by Republican Eagles and Republican Senatorial Campaign Committee	Washington, D.C.
2/5/85	Reception and buffet honoring Senator Bob Packwood	Washington, D.C.
2/15/85	Charlottesville Republican Committee Washington-Lincoln Day fundraising dinner	Charlottesville, Va.
3/5/85	Local Republican Eagles reception	Los Angeles, Calif.
3/14/85	Fundraising reception for Senator Bob Kasten	Washington, D.C.
4/1/85	Republican Senatorial Inner Circle Dinner	Washington, D.C.

(c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of $50 or more for the past 10 years.

None.

14. Honors and awards: List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognitions for outstanding service or achievements.

Thomas Jefferson Fellowship; University of Virginia; 1965-1966

DuPont Fellowship; University of Virginia; 1966-1967

Ford Foundation (dissertation) Fellowship; University of Virginia; 1967-1968

University of Georgia College of Business Administration Award of Merit; April 1984

Adam Smith Award; Association for Private Enterprise Education; April 1985

15. Published writings: List the titles, publishers, and dates of books, articles, reports, or other published materials which you have written.

The following list does not include newspaper op-eds and other minor pieces; copies of any of my writings will be provided gladly upon request.

Books: Why the Draft?: The Case for a Volunteer Army (editor and contributor; Baltimore: Penguin Books, Inc. 1968)

Economic Regulation of Domestic Air Transport: Theory and Policy (with George W. Douglas; Washington: The Brookings Institution, 1974)

Perspectives on Federal Transportation Policy (editor and contributor; Washington: The American Enterprise Institute for Public Policy Research, 1975)

Benefit-Cost Analyses of Social Regulation: Case Studies from the Council on Wage and Price Stability (co-editor with Bruce Yandle; Washington: The American Enterprise Institute for Public Policy Research, 1979)

Reforming Regulation (co-editor and contributor, with Timothy B. Clark and Marvin H. Kosters; Washington: The American Enterprise Institute for Public Policy Research, 1980)

Monographs: Transportation Legislation (published anonymously; Washington: The American Enterprise Institute for Public Policy Research, 1972)

The Economics of the Military Draft (with Ryan C. Amacher et al.; Morristown: General Learning Press, 1973)

Articles: "A Critique of Joan Robinson's Economic Philosophy," Western Politica (Autumn 1967)

"An Aircraft Routing Model for the Airline Firm," American Economist (Spring 1968)

"An Army of Volunteers," Forensic Quarterly (May 1968)

"Marginal Criteria and Draft Deferment Policy" (with Robert D. Tollison and Thomas D. Willett), *Quarterly Review of Economics and Business* (Summer 1968)

"A Paradox on Profits and Factor Prices: Comment," *American Economic Review* (September 1968)

"Short-run Solutions to Airport Congestion," *Atlanta Economic Review* (October 1969); reprinted in Campbell R. McConnell (ed.), *Economic Issues: A Book of Readings* (4th ed.; McGraw-Hill Book Company, 1972)

"A Program for Direct and Proxy Voting in the Legislative Process," *Public Choice* (Fall 1969); reprinted in Ryan C. Amacher, Robert D. Tollison, and Thomas D. Willett (eds.), *The Economic Approach to Public Policy: Selected Readings* (Ithaca: Cornell University Press, 1976)

"Pigou's Three Degrees of Price Discrimination" (with Richard A. Bilas), *Rivista Internazionale de Scienze Economiche e Commerciali* (February 1971)

"A Note on Profits, Entry, and Scale of Plant in the Purely Competitive Model," *Revista Internazionale de Scienze Economiche e Commerciali* (February 1971)

"The Implicit Tax on Reluctant Military Recruits" (with Robert D. Tollison), *Social Science Quarterly* (March 1971)

"A Mathematical Analysis of Pigouvian Second Degree Price Discrimination" (with Richard A. Bilas and Fred A. Massey), *Metroeconomica* (May - August 1971)

"Marginal Revenue and Pigouvian Second Degree Price Discrimination" (with Richard A. Bilas and Fred A. Massey), *Metroeconomica* (August 1971)

"A Time of Day Model for Aircraft Scheduling," *Transportation Science* (August 1972)

"The Optimal Pricing of Freight in Combination Aircraft," *Journal of Transport Economics and Policy* (September 1973)

"The CAB's Domestic Passenger Fare Investigation" (with George W. Douglas), Bell Journal of Economics and Management Science (Spring, 1974); reprinted by The Brookings Institution (Technical Series Reprint T-008)

"Quality Competition, Industry Equilibrium, and Efficiency in the Price-Constrained Airline Market" (with George W. Douglas), American Economic Review (September 1974)

"Government Regulation" (principal author), Chapter 5 in Economic Report of the President, 1975

"Rates of Publication Per Faculty Member in Forty-five 'Rated' Economics Departments" (with Robert D. Tollison), Economic Inquiry (March 1975)

"A Perspective on Airline Regulatory Reform," Journal of Air Law and Commerce (Autumn 1975)

"Environmental Protection: the Need to Consider Costs and Benefits" (with Robert L. Greene), Highway Users Quarterly (1976)

"Effects of the Administration's Proposed Aviation Act of 1975 on Air Carrier Finances," Transportation Journal (Spring, 1976); reprinted in Paul W. MacAvoy and John W. Snow (eds.), Regulation of Passenger Fares and Competition Among the Airlines (Washington: The American Enterprise Institute for Public Policy Research, 1977)

"The New 'Social Regulation'" (with William Lilley III), Public Interest (Spring 1977); reprinted by The American Enterprise Institute for Public Policy Research, Reprint No. 66; reprinted also in numerous magazines, journals, and texts

"Lessons of the Economic Impact Statement Program," Regulation (July/August 1977)

"Regulatory Reform: Some Problems and Approaches," American Enterprise Institute Reprint No. 72 (August 1977)

"Regulators and Experts: A Modest Proposal," Regulation (November/December 1977)

"An Economic Analysis of Airline Fare Deregulation: The Civil Aeronautics Board's Proposal," Transportation Law Journal (1978)

"The Pros and Cons of Trucking Regulation," American Enterprise Institute Reprint No. 95 (November 1978)

"Airline Market Shares vs. Capacity Shares and the Possibility of Short-Run Loss Equilibria," Research in Law and Economics (1979)

"Regulation and the Prospect for Reform," in Charles F. Phillips, Jr. (ed.), Regulation, Competition, and Deregulation - an Economic Grab Bag (Lexington: Washington and Lee University, 1979)

"Collective Ratemaking Reconsidered: A Rebuttal," Transportation Law Journal (1980)

"Has the 1970 Act Been Fair to Mailers?" (with Roger Sherman), in Roger Sherman (ed.), Perspectives on Postal Service Issues (Washington, D.C.: The American Enterprise Institute for Public Policy Research, 1980)

"Protecting Workers' Hearing: An Economic Test for OSHA Initiatives" (with Thomas F. Walton), Regulation (Sept./Oct. 1980)

"Occupational Safety and Health Administration," Regulation (Nov. Dec. 1980)

"The (Nader-) Green-Waitzman Report," Toxic Substances Journal (Winter 1980/1981)

"Regulatory Reform under Ronald Reagan" (with Jeffrey A. Eisenach), in Wayne Valis (ed.), The Future Under President Reagan (Westport, Conn.: Arlington House Publishers, 1981)

"Price Competition on the NYSE" (with Jeffrey A. Eisenach), Regulation (Jan./Feb. 1981)

"Deregulation HQ" (with Murray L. Weidenbaum), Regulation (March/Apr. 1981)

"Regulatory Relief under President Reagan," Jurimetric Journal (Summer 1982)

"Report from Official Washington," Antitrust Law Journal (1982)

"Occupational Exposure to Acrylonitrile: A Benefit/Cost Analysis," Toxic Substances Journal (Winter 1982/1983)

"Report from Official Washington," Antitrust Law Journal (1983)

"Comparative Data on Life-Threatening Risks," Toxic Substances Journal (Summer 1983)

"A Note on Centralized Regulatory Review" (with William F. Shughart II and Robert D. Tollison), Public Choice (January 1984)

"Is Organized Labor Rational in Supporting OSHA?," Southern Economic Journal (January 1984)

"Resale Price Maintenance: An Analytical Framework," Regulation (January/February 1984)

"Reindustrialization Policy: Atari Mercantilism?," in Richard B. McKenzie (ed.), Plant Closings: Public or Private Choice? (revised edition; Washington: CATO Institute, 1984)

"Report from Official Washington," Antitrust Law Journal (1984)

"Reindustrialization through the Free Market," Antitrust Law Journal (1984)

"The Case Against Industrial Policy," CATO Journal (Fall 1984)

"Industrial Policy: Reindustrialization through Competition or Coordinated Action?" (with Thomas F. Walton, William E. Kovacic, and Jeremy A. Rabkin), Yale Journal on Regulation (1984)

"Comments on Baumol and Ordover," Journal of Law and Economics (May 1985)

"Predation: The Changing View in Economics and the Law" (with Paul Pautler), Journal of Law and Economics (May 1985)

16. Speeches: Provide the Committee with two copies of any formal speeches you have delivered during the last 5 years

which you have copies of and are on topics relevant to the position for which you have been nominated.

Provided separately are notebooks containing copies of all formal speeches I have delivered during the past five years. Also provided separately are notebooks containing copies of all Congressional testimony I have delivered during the past five years.

17. Selection:

(a) Do you know why you were chosen for this nomination by the President?

I do not really know the reasons why President Reagan chose me for this position, but they may include those indicated in my answer to the question immediately below.

(b) What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

Relevant background and employment experiences include the following:

i. Personal views on major policy issues in accord with those of the President.

ii. Familiarity with relevant issues facing OMB, due to training as economist, teaching, research, and government service.

iii. Knowledge of how OMB operates, based, in part, on having worked for the agency.

iv. Experience in dealing with Senators, Congressmen, and Hill staff, and in testifying before at least 32 separate Congressional committees or subcommittees.

v. Experience in managing an agency of comparable size.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?

I have no present employer other than the Federal Trade Commission; I have no connections with any other employers, business firms, business associations or business organizations except: (a) Economic Impact Analysts, Inc. (EIA), a family-held Subchapter S corporation formed in 1978, of which I am President and Chairman of the Board, and (b) The American Enterprise Institute for Public Policy Research (AEI), a former employer from which I resigned in January, 1981.

Upon entering government service, EIA became dormant and shall remain so as long as I am in government. Unless requested otherwise, I would prefer to retain the current EIA arrangement in order to avoid having to undertake the necessary legal steps (and costs) required to dissolve the entity. AEI presently carries me on its rolls as "on leave for government service." Unless requested otherwise, I would prefer to retain that arrangement.

2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain.

   No.

3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization?

   No.

4. Has anybody made a commitment to employ your services in any capacity after you leave government service?

   No.

5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?

   It is my present intention to do so, subject to the pleasure of the President.

C. POTENTIAL CONFLICTS OF INTEREST

1. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients or customers.

   None.

2. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated.

   I have no financial assets, except for nominal balances in various checking, savings, and mutual funds accounts. My major liabilities are a first mortgage on our home (B.F. Saul) and a second mortgage on the equity in our home (Riggs National Bank).

3. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

   I do not believe there are any, except possibly for those indicated in answers to questions A.11 and C.2 above.

4. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or public policy.

   While serving as Assistant Director (for Government Operations and Research) of the U.S. Council on Wage and Price Stability (1975-1977), I carried out a program designed to restrain the inflationary impact of regulations and other actions by government agencies; on occasion this program included my testifying before Congressional committees concerning pending legislation.

   While employed by the American Enterprise Institute (1977-1981), I also testified on numerous occasions concerning pending legislation and in addition served as an expert witness on behalf of private parties in a number of administrative hearings and court proceedings.

   Finally, in carrying out official responsibilities as Administrator for Information and Regulatory Affairs at the Office of Management and Budget (1981) and as Chairman of the Federal Trade Commission (1981-present), frequently I have testified on and shared views concerning pending legislation. (See, for example, copies of testimony provided separately.) In addition, while serving as a Member of the Council of the Administrative Conference (1981-present), as well as in my roles at OMB and FTC, I have had extensive involvement with government policymaking and procedure.

5. Explain how you will resolve any potential conflict of interest, including any that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements.)

   I don't believe any potential for conflict of interest exists. If one did present itself, however, I would seek and heed the advice of OMB's designated ethics official.

   For lack of assets posing a significant risk of potential conflict, I have executed no such trust or agreement.

6. Do you agree to have written opinions provided to the Committee by the General Counsel of the agency to which you are nominated and by the Attorney General's office concerning potential conflicts of interest or any other legal barriers to your serving in this position?

   Yes.

D. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, please provide details.

   No.

2. Have you ever been investigated, arrested, charged or held by any Federal, State, or other law enforcement authority for violation of any Federal, State, county or municipal law, regulation or ordinance, other than a minor traffic offense? If so, provide details.

   No.

3. Have you or any business of which you are or were an officer ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.

   In 1983, the Center for Auto Safety and three individual consumers -- Richard D. Camp, Sr., Frank A. Fialkowski, and Dr. Paul E. Lyon -- sued in U.S. District Court for the District of Columbia, asking the court to declare improper my participation in a matter involving General Motors (GM) and the FTC (FTC Docket No. 9045). The allegation was that because of consulting work (not involving FTC matters) I had performed for GM prior to government service (1979 and 1980), there was an appearance of a conflict, even though voluntarily and publicly I had recused myself from any matter involving GM for a period of two years after completion of my work for GM. By order dated April 25, 1984, Judge Harold H. Greene granted summary judgment in my favor. A subsequent appeal by the plaintiffs was dismissed as untimely filed on September 4, 1984. Center for Auto Safety v. FTC et al, No. 84-0056 (D.D.C.), appeal dismissed No. 84-5420 (D.C. Cir.)

In Odgaard v. National Association of Realtors et al., No. 84K1638 (D. Colo., complaint filed 8/14/84) I was named as an individual defendant along with the FTC and many others in a complaint alleging violations of Section 1 of the Sherman Act. The complaint charged that I flouted the Constitution by "ignoring laws, suppressing evidence, disregarding Supreme Court rulings on anticompetitive business practices." The complaint was dismissed by the district court on December 14, 1984, and no appeal was taken.

In addition to the above, I have been named from time to time as a defendant in various civil suits brought against the Commission, in my official capacity as Chairman. All of these cases involved challenges to official actions taken by the Commission as a body rather than by myself personally. For example, I was substituted as a named defendant in the case Bachman v. Miller, No. 76-0079 (D.D.C.) (previously Bachman v. Pertschuk, Bachman v. Collier, etc.), a case brought in 1976 involving alleged discrimination in hiring practices prior to that time.

I do not construe this question as asking for the names of all cases in which I have been named in my official capacity. If, however, such a listing is required, it can be prepared but will require a search of agency records.

4. Have you ever been convicted (including pleas of guilty or nolo contendere) of any criminal violation other than a minor traffic offense?

No.

5. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

I believe the answers given provide all important information, but I shall be happy to respond to any further questions.

PREHEARING QUESTIONS FOR JAMES C. MILLER

I. NOMINATION PROCESS AND POTENTIAL CONFLICTS

1. Were any conditions, expressed or implied, attached to your nomination to be Director of the Office of Management and Budget?

   No.

2. What commitments have you already made with respect to the policies and programs you will attempt to implement as Director of OMB?

   None.

3. Are there any issues involving the OMB from which you may have to disqualify yourself? If so, please explain.

   I do not believe there are any issues involving OMB from which I might have to disqualify myself, but should a question arise in this regard I would seek and heed the advice of OMB's designated ethics official.

II. ROLE OF OMB AND ITS DIRECTOR

1. What do you believe are the most important functions of the position to which you have been nominated?

   First, the OMB Director organizes the President's budget for presentation to Congress.

   Second, the Director endeavors to assure that agencies procure resources in an economical manner, that they manage them effectively, and that the costs they impose upon the private sector through regulations, paperwork, et cetera are the minimum necessary to secure the public interest.

   Third, the Director works with Congress and others to accomplish the President's overall program.

2. How do you envision the relationship and responsibilities of the OMB to (a) the President, (b) the Congress, (c) other executive branch agencies and (d) independent regulatory agencies?

   The OMB Director serves at the pleasure of the President and therefore should be careful to represent accurately the President's views. However, the Director has a responsibility to articulate privately to the President his or her own personal views and to render his or her best judgement.

The Director owes Congress his or her willingness to discuss matters privately, to report accurately his or her perceptions of Congressional views to the President, and to respond publicly in Congressional hearings. Moreover, the Director owes to Congress, no less than to the President, honesty and integrity.

The Director's relations with executive-branch agencies should be highly professional, as both grapple with formulating the President's budget, making sure that program resources are expended efficiently and assuring compliance with the President's program.

The Director interacts with independent agencies through the budgetary process, through the Paperwork Reduction Act, through the solicitation of comments on proposed legislation, and through various other means. However, with respect to independent-agency adjudications, neither the Director nor any of his or her staff should have any contact with agency officials except as a part of the formal record in any proceeding.

III. FISCAL POLICY

1. What new ideas or approaches will you bring to the Budget Director's job to facilitate meaningful action toward deficit reduction?

Like most Americans, I believe the present deficit is much too high and steps must be taken to reduce it.

As Director of OMB, I would work toward reducing the deficit by recommending the elimination of programs that are no longer effective and reductions in funding where modifications in programs would lower their costs.

As I have indicated elsewhere, I believe it terribly important to address the issue of the budget deficit from the standpoint of the effects of spending and taxing policies on real economic activity. For this reason, I support the President's proposal for tax simplification and would anticipate that this legislative change, together with further efforts to reduce the budget deficit, would enhance the prospects for economic growth.

2. In your opinion, what is the proper long-term objective of budget policy: a balanced budget, reduction in the deficit to a specified percentage of GNP, or some other objective?

   The reasons for a government's incurring a deficit are not dissimilar from those that prompt a family to go into debt. And, from time to time, those conditions change. That is, there will be times when it is optimal for a government to run a deficit; other times when it is optimal for a government to balance its budget or even run a surplus.

   Having said this, I want to stress my view that current institutional arrangements are biased toward government deficits (as well as larger-than-optimal budgets). Accordingly, I support the President's call for some form of balanced budget amendment to the Constitution.

3. What role do you believe the federal budget should play in stabilizing economic fluctuations?

   On the whole, I do not believe the federal budget is a particularly good tool for stabilizing economic fluctuations, and thus I would not be in favor of year-to-year budget adjustments for this purpose.

4. What fiscal policy course would you advocate if the economy were to enter a period of stagnation or recession?

   It would depend on circumstances, and the range of scenarios is much too great to answer with any degree of specificity. On the whole, I believe monetary policy is better equipped to deal with problems of stagnation or even recession than is fiscal policy. Let me hasten to add, however, that fiscal policy can have significant effects on aggregate economic activity. It would appear, for example, that total investment and productivity are inversely related to marginal tax rates. Also, by definition, extravagant public spending takes resources from the private sector where they are more productive.

   On the whole, then, I tend to the view that our goal should be a fiscal policy which lays the groundwork for a robust economy, rather than using fiscal policy as a tool for combating stagnation or recession.

5. In response to a pre-hearing question asked by the Committee of David Stockman prior to his confirmation in 1981, Mr. Stockman said, "The Office of Management and Budget seems to have partially abdicated its role in fiscal policy development to other parts of the Executive Branch." Do you agree that was the case during the four years prior to Mr.

Stockman's tenure? Do you think that has been changed since 1981? What is your view of OMB's proper role in the development and implementation of fiscal policy?

> I am not sufficiently familiar with OMB's role in developing fiscal policy during President Carter's term to answer the first portion of this question. However, I do feel that OMB has played a crucial, perhaps pivotal, role in developing fiscal policy since 1981.
>
> I believe that OMB should continue to play a crucial role in the development and implementation of fiscal policy. Although its direct responsibility is for only one side of the fiscal equation -- the budget -- OMB can and should play a cooperative role with the Department of the Treasury, the Council of Economic Advisers, and other agencies in formulating recommendations for the President's consideration, in advocating the President's views before Congress, and in implementing whatever budget program ultimately is enacted.

IV. BUDGET PROCESS

1. In discussing the approach taken on budget preparation in recent years, the National Journal said: "(David) Stockman does more of his own technical work, makes more of the detailed decisions and has more control of the agenda at OMB than anyone who preceded him." How will you approach the process of formulating the President's budget, particularly regarding the use of OMB career staff?

> Having served at OMB and observed the career staff first-hand, I have only the highest regard for these professionals. My intention would be to enhance further the professionalism of the organization and to utilize the services of the career staff as much as possible.

2. Testimony presented this year on behalf of OMB's budget request revealed that the amount requested represented a 16 percent reduction from 1980 in terms of purchasing power. Do you expect there to be further reductions in the future?

> It is difficult for me to answer this question without gaining more familiarity with OMB's budget and without having run the agency. At present, I have no plans to seek a reduction in OMB's budget request. However, as in the case of other agencies, OMB's budget requests in the future would be dictated by Presidential guidance to the agencies.

3. Do you plan any changes in the way OMB is organized?

   I do not have any specific plans at present. Instead, I am keeping an open mind on this matter and would make organizational changes only if that would enable the agency to be more effective.

4. The Central Budget Management System has created greater capacity to explore budget options and track congressional actions. What further steps, if any, are needed to automate budget preparation?

   I am told that steps are now under way to combine the Central Budget Management System (which keeps track of a wide variety of budget information and is especially useful in analyzing different policy options) and the Budget Preparation System (which is used to aggregate various budget components and produce the President's budget). I would anticipate working to achieve this goal as well as to automate further OMB's other budget preparation tasks.

5. What is your view on instituting a two-year budget cycle?

   I have an open mind about such proposals. However, I have certain doubts whether in reality a shift to a biennial budget process would mean substantial differences from what we observe today. First, less than half of each year's budget authority is actually controlled by yearly appropriations, and most of that is defense-related. Second, undoubtedly it would be necessary to update budget proposals with supplementals to reflect changing conditions. On the other hand, to the extent a biennial budget process would yield a more considered, rational budget, there is much to say for the idea.

6. Your predecessor took a very active role in all phases of the congressional budget process. Do you expect to continue this practice during your tenure?

   Yes, subject to the pleasure of the President.

7. OMB's career staff has been characterized by Hugh Heclo and others as providing "neutral competence" in its advice and support to the President. Do you support this concept of neutral competence in the OMB staff and what actions will you take to preserve and strengthen it?

   Yes, I support "neutral competence" -- defined as OMB staff's giving the President and his appointees their very best judgements. To preserve and strengthen this concept, I would insist that career officials perform their duties with integrity and never "pull their punches."

8. The budget process has become more lengthy and cumbersome in recent years. In your opinion, what actions should be taken to steamline the process in both the executive and legislative branches?

This is an extraordinarily important question with no easy answers. Certainly, there is no consensus about the matter among the experts.

Adoption of a two-year budget cycle might ameliorate the situation somewhat, but I suspect the recent problems we have witnessed are more a reflection of the innate difficulty of facing hard choices in dealing with a rising budget deficit than fundamental flaws in the legislative or executive budget processes.

In any event, I would look forward to giving this matter further consideration.

9. What actions by OMB, if any, are needed to strengthen federal program review and evaluation capabilities and to tie the results of these efforts to budgetary decisionmaking?

I believe that our program review and evaluation capabilities -- those at OMB, those at the agencies, and those on Capitol Hill -- are currently good. The difficulty has been a reluctance on the part of elected officials to act on the basis of what these analyses show. I would think it highly desirable where possible to give such analyses even wider circulation in order to lessen the political costs of making rational responses to them.

10. What are your views on maintaining the unified budget? What is your position on the treatment of off-budget programs and trust funds?

I think it very important for decisionmakers -- in this case the President and the Congress -- to have an accurate picture of the ways in which the federal government affects the allocation of the nation's resources. For this reason, I support the proposed "Unified Budget Act of 1985" and note that President Reagan included off-budget items in his 1986 budget preparation.

For the most part, trust funds are financed by earmarked taxes. President Reagan has expressed an interest in taking Social Security out of the budget and making it a separate program -- perhaps even sooner than

1992 when it, as well as Medicare, will be removed from the budget under current law.

11. What actions, if any, do you plan to take to provide for a vigorous, independent analysis of the defense budget?

I would plan to carry out with vigor the work of OMB in reviewing and analyzing defense expenditures and would work with other governmental commissions and groups to accomplish this same objective.

12. What is your position on developing and presenting a separate capital budget for the Federal Government?

A capital budget for a government has some advantages, to be sure. But given a myriad of problems in identifying capital expenditures and in depreciating capital assets in the federal sector, I am not terribly optimistic that a definitive capital budget for the Federal Government could be developed. However, I want to keep an open mind on this matter and would look forward to compiling the annual report required by the Federal Capital Investment Program Information Act as a laboratory in which to address these issues.

13. In a June 1985 speech, your predecessor stated that, "... both sides in the budget debate have increasingly resorted to ... accounting gimmicks, evasions, half-truths and downright dishonesty in our budget numbers, debate and advocacy." Do you share his view? What actions can be taken to better ensure the integrity of economic assumptions and projections of future spending?

I agree that the budget debate increasingly has been characterized by a certain amount of misinformation as well as information. I would appeal to all involved to deal with budget figures honestly and with integrity, and would follow that same advice.

V. MANAGEMENT REFORM AND IMPROVEMENT

1. What do you see as the most significant management problems facing government today?

First, in many areas there is a difficulty in measuring performance. While the matter is much more complicated than the following would suggest, in the private sector there is usually a financial "bottom line" against which an organization's performance can be measured. The "outputs" of government agencies are much more difficult to measure. Consequently, there is a tendency to focus on inputs rather than outputs. (An example with which I am familiar is law enforcement: the "output" is compliance with the law; the "input" is the number of cases brought.) Of course, in some instances -- such as the processing of Social Security forms -- the measurement of output is a relatively straightforward matter; but in other instances -- such as policy planning -- measuring output is problematic.

Second, whatever the definition of output, I believe we need to address more critically the management of the material resources marshaled to produce these outputs. Is there waste, fraud, or other abuses? Is there unwarranted duplication of facilities or excessive overhead? Are the agencies' financial management systems up to par? And, are the right combinations of resources being used?

Third, I believe we need to give renewed emphasis to human resource management. From experience, I know that government employees who are well informed, trusted, and rewarded can perform severalfold over those who are not. On the whole, federal employees perform well; with better management of their efforts, they could perform even better.

2. What should OMB's role be in addressing and remedying these problems?

   I would anticipate that OMB's management division would build upon the President's recent management and productivity improvement initiatives and work with Congress in obtaining the needed legislative changes. Also, I would anticipate OMB's working closely with the Office of Personnel Management to increase employee productivity.

3. According to the National Academy of Public Administration, "The management function in OMB has been persistently downgraded to the point where the present staff capability is inadequate in relation to need...the overriding domination of the budget function as the driving mechanism in presidential decision making has tended to displace the management function." Do you agree with this assessment? Do you plan to increase the resources devoted to management issues?

   I would not agree that OMB's management responsibilities have been neglected under this Administration. Indeed, the President's management improvement initiatives, coordinated and directed by OMB, have contributed significantly to more efficient government.

   On the other hand, while I recognize there is a limit to the extent to which OMB can "micro-manage" the rest of the Executive Branch, I believe that additional management efforts and improvements are warranted, and I would expect to carry them out. In particular, I would want to integrate more fully OMB's budget and management processes.

4. The Grace Commission and a National Academy of Public Administration panel have recommended establishing an Office of Federal Management in different forms to strengthen and refocus the president's management role. What are your views on these two proposals? What other actions could be taken to strengthen the institutional framework for management reform?

   I have not reviewed extensively the recommendations of the Grace Commission and the National Academy with respect to establishing a separate Office of Federal Management. At this time, I believe it would be more appropriate to build upon the work of OMB and the other agencies in pursuit of the President's management and productivity improvement goals (such as those articulated in "Reform '88"). I would plan to keep an open mind on the matter, however.

5. Reform '88, the President's Management Improvement Program, has centered on decreasing the size of government, reducing fraud, waste, and abuse, controlling costs, and improving management efficiency. What impact do you think this program has had on agency operations and what changes, if any, will you make? Do you intend to give greater emphasis to improving program effectiveness?

   To some extent, it is too early to judge the effectiveness of the President's Reform '88 program, except to say that it appears to be on track and appears already to have generated considerable savings to the taxpayer. At this point, I have no specific criticisms of it nor specific plans to make any changes. I would expect, however, to scrutinize the program very carefully and make such improvements as would seem feasible.

6. Do you plan to continue the managment review process begun three years ago? What further improvements are needed?

   I would plan to continue the management review process. As for specific improvements, I would think it best to reserve judgement on that until I had gone through several individual review sessions.

7. Do you believe that OMB should take a more active role in human resource and personnel managment issues? What should be the relationship of OMB and the Office of Personnel Management?

   As indicated above, I do believe that human resource management should be one of our priorities. I would anticipate a very close working relationship between OMB and OPM to secure the objectives of improved personnel efficiency.

8. Management functions are currently performed in three different OMB units: the divisions reporting to the Associate Director for Management, the Office of Information and Regulatory Affairs, and the Office of Federal Procurement Policy. Is this a satisfactory organizational arrangement? How will you ensure that the work of these units is sufficiently coordinated?

On the whole, it would appear to me that the present arrangement is satisfactory. However, I would like to see OFPP more fully integrated into OMB. (This change, as well as any significant change involving OIRA, would require legislation, as both are statutory entities.)

Through close communications and supervision, I would insure that the work of these three management units was not only coordinated with each other, but also with the operations of OMB's budget divisions.

9. In a speech last year, the Comptroller General suggested that more of the responsibility for management improvement be given to the departments and agencies, with the central agencies confining themselves to needed crosscutting management activities. Do you support delegating more responsibility to the agencies?

My present information is not sufficient for me to conclude whether more or less delegation is appropriate. I do realize, however, that recently OMB has taken steps to make agencies more responsible for their management performance, and I would look forward to evaluating how this is working.

10. What changes, if any, would you make in the role and responsibilities of departmental assistant secretaries for management/administration? In your opinion, should they be career officials or political executives?

At present, I would advocate no substantial changes in OMB's relationship with the assistant secretaries for management/administration in the various departments and agencies. (Of course, OMB should continue to support to the fullest their efforts to improve how well their agencies are managed.)

As to whether these assistant secretaries should be career officials or political executives, I think this depends, in part, on the nature of the organization.

11. Streamlining the Federal field structure is a major Reform '88 initiative and OMB has set agency targets for field office closings and downgradings. There is concern that this will result in a deterioration of sevices in several agencies. What will you do to ensure that individual agency actions will be cost-beneficial and preserve the quality of services provided? Do you intend to inform the Congress of proposed streamlining actions before they occur?

> Actually, two questions are presented. First, whether streamlining the federal field structure would result in actual improvements in the quality of services rendered. And second, in those cases where streamlining inevitably would result in the deterioration of some services whether this would be considered of marginal importance in relation to other budget priorities. I would expect answers to these questions to be based on careful analysis. In any event, I would insist that Congress be informed of all such streamlining actions.

12. OMB does not now maintain an institutional capacity for designing options for reorganizing and simplifying the government. Should such a unit be established?

> Although OMB does not maintain a unit specifically devoted to questions of government reorganization and simplification, it nevertheless carries out this function through its budget, as well as management, divisions. At present I see no need to establish a separate unit.

VI. INTERGOVERNMENTAL RELATIONS

1. How do you view OMB's role in intergovernmental relations? What are the tasks that OMB must execute in order to perform this function reponsibly?

> Because of the impact of the federal budget on the economies of States and localities, and because of the interrelationships among the services provided by federal, state, and local jurisdictions, I think it propitious for OMB to maintain a close liaison with state and local governments -- to solicit information and advice, as well as communicate the nature of and reasons for budgetary action.

2. The Federal Regional Councils have been abolished. Agencies are now free to deviate from the standard federal regions policy, where appropriate, to streamline their operations. What do you believe OMB's role should be in coordinating Federal activities at the regional level?

I believe agencies should be encouraged to streamline their operations where the result would be greater efficiency. OMB should continue to employ the Circular A-105 process to determine when and where agencies may deviate from the standard Federal regions.

3. Do you believe that there is a need to further reduce federal regulatory burdens on States and local governments? Is it your view that the Executive Order 12291 and 12498 processes -- as currently structured -- provide an adequate strategy for accomplishing this objective, or do you believe that some additional efforts are needed?

We should always be vigilant in identifying opportunities to reduce the regulatory burden while meeting the legitimate goals of regulation. This applies to state and local governments as well as the private sector.

In my view, the processes established pursuant to Executive Orders 12291 and 12498 provide a sufficient framework for accomplishing this objective within the existing statutory framework. (Of course, legislative changes to reduce the regulatory burden on state and local governments may well be warranted.)

4. What additional grant consolidations or block grants are needed?

I support the four "mega" block grant proposals which President Reagan proposed to Congress on February 27, 1983. Moreover, I believe there may well be further opportunities for grant consolidations, although I express no specific views on such possibilities at the present time.

5. Do you believe State and local governments should be exempt from the requirements of the Fair Labor Standards Act? If so, how would you provide for such exemption?

Consistent with notions of federalism, I tend to believe that state and local governments should be exempt from the requirements of the Fair Labor Standards Act. (In other words, the standards employed should be a matter for state and local jurisdictions to decide.)

I am of course familiar with the Supreme Court's decision in Garcia, holding that state and local governments are not exempt from the Act. One possible way of remedying the current situation has been put forward by Senator Nickles. I understand that his bill (S.1570) would exempt state and local governments from the Act's overtime, but not its wage, provisions; would exempt volunteers from both overtime and wage provisions; and would limit Garcia's retroactivity requirements. This is a proposal which deserves serious consideration.

6. Do you believe there should be limits on the extent to which generally applicable or crosscutting requirements, e.g., historic preservation, environmental review, and merit personnel standards should be applied to State and local government activities? Where and how would you draw the line?

   I think we constantly should search for opportunities to reduce the regulatory burden imposed on state and local governments by crosscutting requirements. Some progress has been made in this regard, but more needs to be accomplished.

VII. PROCUREMENT

1. The enactment of the Competition in Contracting Act was one of the Committee's major achievements last Congress. Do you intend to support the implementation of the provisions in the legislation?

   Yes.

2. OMB has placed increased emphasis on agencies conducting so-called A-76 reviews of commercial-type activities. In September 1984 it refocused the program toward productivity improvement by permitting federal agencies to compete with the private sector. Will you continue working toward expansion of A-76 reviews? Do you see them as a productivity improvement tool?

   If confirmed, I would continue working toward the expansion of A-76 reviews. I do see them as a tool for improving productivity.

3. The Office of Federal Procurement Policy has been headed for several months by an acting administrator. Would you urge that the President appoint a permanent administrator and will he or she report directly to you? What can and will you do to expedite this appointment?

   I would urge the President to appoint a permanent administrator of OFPP as soon as possible, and I would anticipate having that administrator report directly to me. Also, I support Administration-sponsored legislation formally to merge OFPP into OMB.

4. What steps, if any, do you see as necessary to upgrade the procurement workforce in both defense and civilian agencies?

I believe we can and must do more to train existing personnel and to acquire more experienced and qualified personnel in the procurement workforce -- both at senior levels and at entering levels.

5. What role do you think OMB should play in addressing defense procurement problems?

    I think OMB would do well to work with the Department of Defense, the recently-established Presidential Blue Ribbon Commission on Defense Management, and with other organizations to address problems of defense procurement. We all, I think, share the goal of meeting our military obligations at the lowest possible cost.

VIII. FINANCIAL MANAGEMENT

1. What are your views on the current state of the government's financial management structure and what actions are needed to improve it?

    As part of the President's Reform '88 Program, there is an intense effort under way to improve agency financial management. I believe more needs to be done to streamline agency systems in order to assure full disclosure of agency financial activities, to give agency officials sufficient information to manage their budgets, and to provide for greater accountability.

2. In a February 1985 report, the Comptroller General said, "Only through auditing and consolidating departmental operating results and financial operations can the complete picture of governmental activities be reliably portrayed. Information that compares the expenses of operations with the revenue available to fund those operations is important for effective cost analysis of government activities." Do you support the idea of developing consolidated financial statements for the Federal Government? If not, in what way can full disclosure of the government's financial position be achieved?

    I believe that auditing departmental operating results is very important, but I am not sure that consolidating financial statements would necessarily yield significant additional information. In any event, I think it important to assure insofar as possible full disclosure of an agency's financial activities.

3. The Grace Commission urged the establishment of a financial management office in the recommended Office of Federal Management and the appointment of a senior financial officer similar to the Comptroller General. Even if an OFM is not established, would you support actions to consolidate and

strengthen financial management leadership in the Executive Branch?

I do indeed support actions to strengthen financial management in the Executive Branch, though I reserve judgement on whether consolidation is the answer.

4. According to the Comptroller General, the government's budgeting and accounting processes have not been integrated and developed to a point where they are fully useful for management control and planning purposes. What can be done to perform budgeting and accounting more on the same basis so that actual results can be better measured against plans?

I believe that recent efforts to improve agency financial management and to bring off-budget entities into the budget are a step in the right direction. Perhaps more needs to be done, but I defer judgement on that for the present.

5. Do you support the idea that financial systems should provide consistent data on cost and performance of Government programs so that Congress and the Executive Branch can assess the efficiency and effectiveness of operations? How would you achieve the needed development and reporting of program cost data?

Where agency activities are similar, I would anticipate taking steps to assure that financial reports are comparable. I would anticipate working with agency officials as well as OMB executives to achieve this goal.

6. The Comptroller General has called for a major effort to rebuild the government's financial management structure and has proposed a joint effort involving both legislative and executive agencies. What are your views on undertaking such a joint effort?

I believe the goals articulated by the Comptroller General are laudable, although I do not necessarily agree with all of his specific recommendations. The idea of a joint effort has considerable merit.

IX. PAPERWORK AND INFORMATION MANAGEMENT

1. GAO and others have criticized OMB for not devoting sufficient attention to some Federal Paperwork Act requirements, especially those associated with information resources management. What actions will you take to ensure that all requirements of the Paperwork Act are complied with?

I would, of course, assure compliance with the Act. To some extent, however, I believe that expectations have been unrealistically high as to the degree of control that OMB might exercise over agency information systems. As I see it, OMB's role is that of providing substantial guidance to the agencies and insisting that the guidance be followed. OMB cannot micro-manage each agency's information resources. As both OMB and the agencies gain more experience, I am confident that performance in this regard will be improved. In any event, I understand that OMB has made significant progress in this area since the initial GAO report of two years ago.

2. OMB has made progress in reducing the federal paperwork burden (a 32 percent reduction compared to the burden when the Federal Paperwork Act was passed in 1980). Nevertheless, the total burden has grown in recent years if one considers the many existing information requests not included in the 1980 total and the new paperwork requirements that have been established since that time. What further steps do you believe are needed to control and reduce this total burden?

   I know from experience there are no easy answers to this question. I believe it important that the Information Collection Budget incorporate all relevant items, and that each new paperwork requirement be judged on its on merits with an eye to meeting certain aggregate limits on the paperwork burden. More efforts to reevaluate existing paperwork requirements might well net further reductions in this burden. Also, greater Congressional sensitivity to statutorily-imposed paperwork burdens would help.

3. What steps will you take to bring to a successful conclusion the OIRA initiative to revise and consolidate the four existing OMB circulars on information management?

   OMB is still receiving comments on the draft circular it published last March. I would insist that OIRA: (a) move quickly to reflect these comments in any revised version, (b) promulgate the final version expeditiously, (c) explain the circular fully to agency officials, and (d) see that its provisions are carried out.

4. Do you believe that the oversight and coordination of Federal statistical programs is adequate? Would you propose that any new steps be taken at this time?

   The establishment of a separate statistical office in OIRA appears to have improved OMB's efforts in this area. I would anticipate searching for opportunities to improve matters further, although I contemplate no specific new steps at this time.

5. OMB's draft report, Management of the U.S. Government, Fiscal Year 1986, said, "Despite substantial improvements, Federal agencies have not realized the efficiency improvements and economic returns that information technology has made possible." The report described a three-point strategy for restoring the Government's position as an information technology leader. What priority do you place on moving forward with this initiative? What further steps are needed to take full advantage of available technology?

   I agree with the three-point strategy outlined in the OMB report and would plan to give its implementation high priority.

   As for further steps, I would like to see OMB involvement at earlier stages of agency planning for information systems, more specific rate-of-return requirements for new systems, and standards that foster more open systems of communication.

X. REGULATORY REFORM

1. What is your view of OMB's role in reviewing Federal agency regulatory agendas and approving specific regulatory actions?

   OMB's role under Executive Order 12291 is to review rules and their accompanying analyses to assure their consistency with the President's program of regulatory relief. Under Executive Order 12498, most major regulatory agencies are required to submit an annual statement of their regulatory goals and a summary of their significant planned regulatory actions. OMB is then directed to review these goals and plans for consistency with the President's regulatory principles and to publish the results of this process.

   I believe OMB has performed admirably under Executive Order 12291, and although it may be too soon to judge OMB's performance under Executive Order 12498, it would appear that the program is right on track.

2. Given OMB's role under Executive Orders 12,291 and 12,498, what safeguards do you see as necessary to insure the fairness and integrity of the decisionmaking process?

   Fairness and integrity in the administrative process are very important. Consequently, information transmitted to OMB by private parties must be made available to the public and to the agencies for inclusion in the records of their proceedings. Moreover, I support legislation that was considered favorably by this committee during the last Congress that would require that initial regulatory proposals be made publicly available after a final decision was reached. Of course, I know of the new OMB procedures involving the Environmental Protection Agency and would look forward to appraising whether they should be modified and/or expanded to other agencies.

3. In your opinion, to what extent should contacts between OMB, private parties, and agency officials be made public through logging and disclosure requirements for oral and written communications?

I am of course sensitive to the position some have taken that all such communications involving OMB officials should be made public. At the same time, I am cognizant of the need for the President (or his assigns) to deal with his subordinates in a fashion that does not chill the deliberative process or otherwise interfere with the President's ability to carry out his supervisory responsibilities.

At the present time I would favor making more public disclosure of the nature and source of contacts by private parties, but to protect the deliberative process I would not favor further disclosure of inter-agency communications.

4. When Congress delegates a discretionary duty expressly to an agency official, what role can the President's agents play in the official's decisionmaking scheme?

It is my understanding that according to the Constitution the President has ample authority (as well as a responsibility) to see that executive-branch regulatory officials faithfully discharge their duties. To this end, the President may establish a mechanism for systematic review of agency regulatory proposals.

Although I do not believe OMB should displace an agency official as the final decisionmaker in any rule or regulation, I do believe that OMB's role in judging the consistency of proposed regulations with the President's policies is altogether appropriate.

5. Some have said that one of the problems of OMB regulatory review and planning is that, while the process can serve to coordinate and rationalize regulatory policy implementation across the Executive Branch, it can also be used to redirect regulatory policy without adequate regard for Congressional intent. How do you propose to assure that this does not occur under your stewardship?

I believe that Congressional intent is usually evident from the "plain language" construction of a regulatory statute. Where such construction affords discretion to the executive branch in implementing the statute, I believe the responsible executive-branch official should be guided by the President's regulatory policies. It is clear to me that OMB's regulatory review function is not to contravene Congressional intent, and I would insist that this principle be followed.

XI. RELATIONS WITH CONGRESS

1. If you are confirmed, do you agree without reservation to appear and testify before any duly constituted committee of the Congress?

   Yes.

2. Are you willing to provide such information as is requested by such committees?

   Yes, subject to any possible claim of Executive Privilege, or other privileged communications, the revealing of which might possibly chill the deliberative process.

Chairman ROTH. Senator Eagleton may have an opening statement. We will have to wait until he arrives. At this time, we are very, very pleased to have our two colleagues here, Senator Mattingly who, of course, comes from Mr. Miller's home State, and Senator Gramm, who has been closely associated in the past with him. They are here for the purpose of introducing Mr. Miller.

Senator Mattingly.

TESTIMONY OF HON. MACK MATTINGLY, U.S. SENATOR FROM THE STATE OF GEORGIA

Senator MATTINGLY. Thank you, Mr. Chairman.

Mr. Chairman, I am pleased to introduce to the committee Jim Miller, the President's nominee for the Director of the Office of Management and Budget to succeed David Stockman.

Over the years, I think this position, as you stated, has grown in importance to the point where it is now rightly seen as one of the most critical jobs in the Federal Government. In view of the out-of-control Federal deficit, I think it is imperative that we have a Director of the OMB that: No. 1, is a top-notch administrator; No. 2, is really familiar with the ways of Government; and No. 3 is well-rounded in good economic theory.

I think Jim Miller has all of these qualities and many others, and I am confident that he will meet the many challenges that he will face as the new Director of the OMB. I don't believe the President could name a better person for that job.

Since 1981, as you know, Dr. Miller has been serving as a member and Chairman of the Federal Trade Commission. Prior to his appointment to the FTC, he served as Administrator for Information and Regulatory Affairs at OMB from 1977 to 1981.

He was a resident scholar at the American Enterprise Institute; he was codirector of the AEI Center for the Study of Government Regulation; and during that time, he also served as a member of the board of editors at AEI's journal called Regulation and served on the board of editorial advisors of "The AEI's Economist."

You stated Jim was born in Georgia. He received a BBA degree at the University of Georgia and received a Ph.D. degree from the University of Virginia. Let me just state that the job awaiting him is going to be a very, very difficult one.

Every decision that the Director will be making is going to be subject to a lot of disagreement and a lot of criticism. But I know Jim Miller, and I know that he is not only qualified for the job, but he is tough enough for the job.

I look forward to a speedy confirmation, and I congratulate him on his nomination.

There is just one final piece of advice I would like to give Jim. No matter how frustrating it may get in dealing with the bureaucrats and Congress, don't ever give a long, soul-searching interview to the Atlantic Monthly. [Laughter.]

Save it for your memoirs, Jim.

Thank you, Mr. Chairman.

Chairman ROTH. Let me just say at this stage that I know Sam Nunn, the other Senator from Georgia, was anxious to be here, but unfortunately, other events intervened. He hopes to be, but will drop in at a later time.

Senator Gramm.

TESTIMONY OF HON. PHIL GRAMM, U.S. SENATOR FROM THE STATE OF TEXAS

Senator GRAMM. Mr. Chairman, first, let me say that it has been my pleasure on many occasions to come before this committee to introduce and speak on behalf of candidates from my State. Jim Miller has a Texas connection that I will get into, but before doing that, Mr. Chairman, let me say that I have never had the opportunity to introduce anybody to this committee or any other committee in Congress that I have known better or felt more strongly about than I do Jim Miller.

I am not in quite as good a position to introduce Jim as the guy's mama, who showed up at the political rally to introduce her son and said, "I know this candidate well." But it is close. I have known Jimmy since we were both undergraduates and teenagers. I have been a graduate student with him. I have taught with him at Texas A&M University. I have worked with him in his capacities in the private sector as a consultant; as a scholar, where his record was exemplary; where his work was fundamental path-breaking research that cleared the way to promote efficiency and economy and job creation through deregulation and free enterprise.

I have known him in his many positions in the Government, and Mr. Chairman, whether it was his position at the Department of Transportation or the Council of Economic Advisors or as Administrator of Information and Regulatory Affairs at OMB or finally, as Chairman of the Federal Trade Commission, there is one word that describes Jim Miller's record in the Federal Government: And that word is success.

Everything he has done he has done well. He has exhibited professionalism; he has learned the system; he has worked within the system. He has been a faithful officer of the Government in carrying out the law of the land and the mandate of the people in several administrations which have accorded him the position of authority.

I knew his predecessor, David Stockman, well. I served with him in the House. I worked with him as a member of the Budget Committee in the House on landmark budgeting. You were correct, Mr. Chairman. He is going to be a hard act to follow.

But I believe that Jim Miller will be effective in following that hard act. I am confident that he is going to leave a mark at OMB. I am confident that he is going to provide a broad base of leadership at OMB, not just on the budget, but on the management functions that you talked about earlier.

I strongly believe in Jim Miller, and I believe, as one who has worked on the budget in the past and who is going to be working on it in the future, that we need strong leadership. It is a very difficult job dealing with the Nation's budget problems and priorities.

While we are clearly concerned with many issues, I believe, Mr. Chairman, that the American people are concerned about the Federal deficit. That is their No. 1 issue. You are, today, holding a hearing for the appointment of the man who is going to be at the point in this battle. I don't know of anybody who is better qualified, who is better trained and who is more committed to dealing with that job than Jimmy Miller.

I am happy to be here to introduce him to you today, to commend him to you for appointment, to urge this committee to act quickly and send this nomination to the floor of the Senate. We need leadership at OMB. There is a big job to be done. There are positions to be filled. There is leadership to provide, and time is wasting.

I urge you not only to approve Jim Miller's nomination in committee, but to send it quickly to the floor so that we can send him to OMB to begin what will be his biggest job ever on behalf of the Government. I am convinced that he will do well in that job, as he has in everything else that he has done on behalf of the American people as an appointee in several administrations.

So I commend to you, Mr. Chairman, and to this committee.

Chairman ROTH. I thank you, Phil, for taking the time to come here and for your very eloquent statement on behalf of Mr. Miller.

I certainly agree with you both as to the importance of the job and the need for filling it promptly. Thank you very much.

Senator GRAMM. Now you are on your own.

Mr. MILLER. Thank you.

Chairman ROTH. Before we proceed, we have Senator Eagleton and Senator Gore here.

Senator Eagleton, Senator Gore.

Senator EAGLETON. In this case, I will yield to Senator Gore at this time.

Chairman ROTH. Senator Gore.

Senator GORE. Thank you, Mr. Chairman.

OPENING STATEMENT OF SENATOR GORE

I didn't get here much before you did, Senator Eagleton.

I would like to make a brief opening statement. I normally just put them in the record, Mr. Chairman, but it won't take long. I do have a few thoughts to air on this nomination.

I have had an opportunity to work with Mr. Miller for a number of years now. The first time, he came before a committee on which I served when I was in the House of Representatives and he was advising a think tank outside the Government.

Now he comes before us as the President's nominee for the Director of OMB.

This post is an enormously important one in the Government, if for no other reason than OMB has acquired such enormous power in recent years, and since 1981 particularly. I believe there has been a trend toward concentrating the power of the administrative branch in OMB, so that it now holds sway over a vast array of Government activities, ranging from approving every dollar the Government spends to every page printed in the Federal Register.

Since the Director of OMB is in a position to influence nearly all of the Government's work, we should consider the individual nominated in a very sober and deliberate manner. Mr. Chairman, nowhere has this mark of concentration of power been more evident than in the area of Government regulation. Prior to the Reagan administration, Government regulation was essentially a decentralized activity, with each agency conducting its own affairs as prescribed by law.

While Presidents Nixon, Ford, and Carter all proposed some general guidelines for regulation and deregulation in their respective administrations, never before had we seen control as was exerted by Executive Order 12291, promulgated in February 1981.

It made it such that Government agencies could take no regulatory action that did not meet OMB guidelines. In the name of deregulation and cost-benefit analysis, OMB assumed almost total control over one of the paramount functions of Government. The architect of that system constructed by Executive Order 12291 was, of course, James Miller, the nominee we have before us here today.

The office of OMB assumes even greater power in the form of Executive Order 12498. OMB not only holds veto power over regulations that were already developed but this new assertion of power makes it such that OMB must approve all plans for regulation in advance. Even regulations that are being contemplated now must pass OMB muster.

For me, this assertion of power has been troubling, and that, of course, is no secret to Dr. Miller. We have discussed it in public forums and also privately. I respect the difference of opinion that we have. But I firmly believe, Mr. Chairman, that the system devised by these Executive orders is of highly questionable constitutionality. There are two legitimate sources of power exerted by Government agencies: One is derived from article 1 of the Constitution; the other from article 2. There are certain powers granted to the Presidency in article 2, but most of the powers that are exerted by the executive departments to form regulations flow indirectly to them through the Congress of the United States.

Power comes from the American people to the legislative branch, and then we delegate that power to certain executive departments. Often that delegation is accompanied with procedural safeguards and guidelines which we believe it is necessary for the executive branch to follow.

If the Office of Management and Budget highjacks that power and seeks to exert that power on its own, discarding in the process the guidelines and procedural safeguards appended to that power when it was delegated by the legislative branch, then the power is exercised in an extra-constitutional manner. Although the courts have not heard or decided this question, in my opinion, when it finally works its way up for a decision, that view will probably be reaffirmed by the courts. That is just my own personal opinion.

In any event, I believe that Dr. Miller should answer a number of questions about where we go from here on cost-benefit analysis and on the assertion by OMB of its alleged right to dictate to executive branch agencies exactly what regulations they can issue and what regulations will be put into effect.

I look forward to a frank and open discussion with Jim Miller. I hope he will approach this proceeding with the same open mind that I believe all members of this subcommittee have. While I disagreed with him for a number of years, it has always been an honest disagreement based on policy and ideology, and I have great respect for his ability and I enjoy our friendship, even when we disagree.

So I look forward to these hearings, Mr. Chairman. Thank you.

Chairman Roth. Thank you.

Senator Eagleton.

OPENING STATEMENT OF SENATOR EAGLETON

Senator Eagleton. Thank you, Mr. Chairman.

Senator Gore very well covered some of the material that I would have stated in my opening statement.

I will, in my questioning, go into this superenhanced role of OMB. Mr. Miller was, at one time prior to his service at the FTC, with OMB, and I will go into a couple of the executive orders that have been issued that give OMB a personal stranglehold on many of the Federal agencies. I will go into some of Mr. Miller's different policies while he served at FTC.

If that sounds a shade negative, on the positive side, Mr. Miller has certainly impressive qualifications and great experience and a pre-eminent reputation in both the private and public sectors. So such disagreements as we may have here today are disagreements over policy and how it is implemented and how it is executed and in no way disagreements over his skills and his intellect and et cetera.

I ask unanimous consent that my entire opening statement be printed in the record as though read.

Chairman Roth. Without objection. Senator's Nunn's prepared statement will be inserted in the record following Senator Eagleton's prepared statement.

[Prepared statements of Senators Eagleton and Nunn follow:]

PREPARED STATEMENT OF SENATOR EAGLETON

Mr. Chairman, the purposes of today's hearing are twofold. First, we must review and assess the qualifications Mr. Miller brings to what is without doubt the most important executive position this Committee confirms, the head of OMB. Second, since our Committee has oversight jurisdiction over OMB, we must probe Mr. Miller's philosophy and approach to running OMB.

To the best of my recollection, it has been over 4½ years since this Committee has had the opportunity to examine OMB's role and powers in a comprehensive manner. Much can happen in 4½ years, and in this case, much has happened. While OMB has historically been "an agency to be reckoned with," under President Reagan that office's powers and reach have swelled beyond measure. OMB, in addition to its traditional authority over budget preparation, now plays a paramount role in, for example: development of agency budgets and congressional testimony pertaining thereto; control over development of most agency regulations; and control over the collection and dissemination of government information. In my opinion, OMB is, by executive fiat, already well on the way to becoming the "superagency" of our government. I am not sure this development is all for the best.

The two executive orders, for instance, that call for stepped-up OMB involvement in the regulatory process in fact ensure Presidential control over agency rulemaking. Five years of experience under this regime have confirmed our worst fears: the public record shows that OMB has acted as a conduit for industry views without so indicating; held secret meetings with industry and unrecorded meetings with the regulatory agencies; deliberately delayed proposed regulations, even forcing violation of statutory deadlines; and, subjected expert agency judgments to questionable cost-benefit analysis. The truth is that OMB is displacing agency discretion. OMB is a regulatory juggernaut.

Mr. Chairman, there is another, far more sobering OMB initiative which I would like to mention. In March OMB published a draft rule which, if finalized, will fundamentally change the nature of our government. It calls for a sharp reduction in the government's efforts to gather and make available to the public, information about all aspects of American life. OMB would have authority over all information-gathering efforts by the agencies. Agencies would have to: 1) show that the information was essential to its mission; 2) meet a hocus-pocus, subjective test that the information's "benefits" justified its "costs," and 3) turn over "where possible" all information to the private sector who can then charge for its distribution. If an agency is allowed to retain authority over the information, the government, too, must charge. We know there is no free lunch, but is there now no free information—even where compiled at taxpayer's expense! Is this free-market ideology gone wild?

This plan—encompassing information as diverse as labor, health, housing, economic, trade and environmental data—I submit, muzzles agencies in such a thorough-going way that even the Soviets with their famed secrecy would be impressed. This information-suppression doctrine is fundamentally alien to our democratic government, erects a wall between citizens and their government and hides bureaucratic error and incompetence. Why is this necessary?

The issues we will discuss today may not be as obviously weighty as those of war and peace or economic survival, but they are in a very real sense as critical. OMB has become the brain that runs the government, and this brain is leading us into some very strange waters. Mr. Miller may soon take the helm and we owe it to ourselves to understand where he will lead.

Mr. Miller's personal qualifications are impressive, and his experience thus far has certainly provided us with a significant record on which we can judge his suitability for OMB Director. He has produced an enormous corpus of writings on matter directly related to the office to which he has been nominated. He has years of experience working in crucial areas of the government, and has spent even more time studying it from the outside. Mr. Miller was the Administration's deregulation expert back in 1981 and can claim responsibility, in large part, for the system of regulatory review now in place at OMB—and I will have some questions for him about that. Most recently, he has served as Chairman of the Federal Trade Commission during a particularly contentious time for one of the nation's oldest regulatory agencies. I will have some questions on his tenure there as well.

Mr. Chairman, this confirmation hearing has provided us with an excellent forum in which to focus on the issues among the most critical to this Committee's jurisdiction. I look forward to hearing Mr. Miller and the other witnesses before us today.

Thank you.

OPENING STATEMENT OF SENATOR NUNN

Mr. Chairman, Members of the Committee, it is a distinct pleasure to introduce and support the nomination of a fellow Georgian, James C. Miller, to be Director of the Office of Management and Budget. Through my personal and professional relationship with Jim over the years, I know him to possess the requisite competence, dedication, and personal motivation that will enable him to successfully carry out the duties of this important position.

I believe the Committee will find that Jim's educational background and professional experience eminently qualifies him for this important position. Jim's preparation for government service began at Rockdale County High School near Atlanta, and continued at the University of Georgia, where he graduated with a degree in economics. After receiving a doctorate in economics from the University of Virginia, Jim returned to Georgia as an Assistant Professor of Economics at Georgia State University in Atlanta. From there he migrated north to the nation's capital where he began his government service as Senior Staff Economist at the U.S. Department of Transportation.

Since then, he has held various research and scholarly positions at the Brookings Institution and the American Enterprise Institute for Public Policy Research, and has served as a consultant to various state commissions and federal agencies. He was Senior Staff Economist for the U.S. Council of Economic Advisers, and Assistant Director of the U.S. Council on Wage and Price Stability. Recently, Jim served as Administrator of the U.S. Office of Information and Regulatory Affairs within the Office of Management and Budget, and Executive Director of the Presidential Task Force on Regulatory Relief prior to his appointment by President Reagan as Director of the Federal Trade Commission, the position he currently holds.

I believe our nation is perilously close to the edge of economic calamity. With $200 billion annual budget deficits predicted for the rest of the decade and a $150 billion trade deficit, which is largely the result of an overvalued dollar, it is absolutely critical that the President and Congress take positive and significant steps to establish a coherent fiscal policy that will put our nation on a five- to six-year glidepath toward a balanced federal budget. We simply cannot permit deficits of this magnitude to continue indefinitely.

Mr. Chairman, many in and out of government disagree over the relative merits of the Budget Control and Impoundment Act of 1974, which, among other things, established a separate Office of Management and Budget. However, an issue over which there is little doubt is the fact that the person who occupies the position of OMB Director has an enormous responsibility. This person is responsible for preparing the President's budget for submission to Congress; he must ensure that federal agencies utilize their resources in an efficient and economical manner, and that the cost of federal regulations are not excessively burdensome on the private sector; and he must work with Congress and special interests to formulate a workable fiscal policy that provides for the health of the nation's economy.

I believe this nominee possesses the necessary qualifications to carry out these important responsibilities, and I urge the Committee to give its approval to the confirmation of Jim Miller as Director of the Office of Management and Budget.

Chairman ROTH. Dr. Miller, our committee rules, as you probably know, require that all nominees give their testimony under oath. So would you please stand and raise your right hand?

Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Mr. MILLER. I do.

Chairman ROTH. Please be seated.

Do you have an opening statement?

Mr. MILLER. Yes, Mr. Chairman, I do.

Chairman ROTH. Please proceed.

TESTIMONY OF JAMES C. MILLER III, NOMINEE TO BE DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET

Mr. MILLER. Mr. Chairman and members of the committee, it is a great honor for me to appear before you today.

First, let me express my appreciation to Senator Mattingly and Senator Gramm and also to Senator Nunn for their kind remarks on my behalf. I am proud to have their support and friendship.

I am also very proud President Reagan has expressed his confidence in me by nominating me to be Director of the Office of Management and Budget. It has been the greatest pleasure and honor of my professional life to serve in his administration, and my efforts to merit his continued confidence will be untiring.

It is with a deep sense of humility that I appear before you today as the President's nominee for this important post in our Government. The work that lies ahead of me, should I earn confirmation by the Senate, is long and hard. I know after spending time with many of you over the last several weeks, there are no easy answers to the difficult and critical budget and management problems facing the President and Congress—only hard and unpleasant choices.

I know better than ever, after talking with you, how diligently and how earnestly you, as well as the President, have worked to confront and discharge the responsibilities, and yes, how frustrating and slow progress sometimes can be.

But I also must say that as this day has approached, I felt a certain sense of excitement and anticipation to meet the challenges that are before me. There may be no easy answers, but I promise you I will devote all my energies to exploring the existing alternatives and finding new ones and then making the tough choices and taking the hard knocks that come with it.

I am looking forward to the prospect of working with you, Mr. Chairman, with members of this committee, as well as your colleagues in the Senate and in the House. Should I merit approval by this committee and confirmation by the Senate, I promise I shall faithfully and honestly discharge the duties of the office to the best of my ability. I hope and trust that together, we will tackle the important work at hand and continue the progress we have made in getting the Nation's fiscal and management houses in order.

I have an abiding faith that under President Reagan's leadership, hard work and firm resolve will enable us to fulfill our responsibilities to our daughters, sons, and generations yet unborn.

Mr. Chairman and members of the committee, I am anxious to get to work. I will be more than pleased to respond to all of your questions.

Thank you, sir.

Chairman ROTH. Thank you. As I indicated earlier, members of this committee have already asked some prehearing policy questions, and your responses have been placed in the record.

There are, of course, several areas of questioning, both personal and policy, that I, as well as others, would like to pursue at this time.

In the interest of providing all Senators with equal opportunity to question the witness, I suggest that we proceed under a 15-minute rule, at least on the first series of questions.

We will, as is the practice of this committee, use the early bird rule, and Senators will proceed according to the time they were here.

Let me start out with these questions that are standard. Is there anything you are aware of in your background which might present a conflict of interest with the duties of the office to which you have been nominated?

Mr. MILLER. Mr. Chairman, the general counsel of the Federal Trade Commission and the general counsel of OMB have worked with your staff and identified two areas that might possibly pose conflicts of interest. They are the limited partnership that I have in a milk processing plant—a very small partnership, I should mention—and also the fact that I'm on indefinite leave from the American Enterprise Institute for Public Policy Research. Accordingly, we have drafted a recusal agreement to cover any matter that comes before OMB that might affect either of these two organizations in some financial way. I have signed and executed this recusal direction to officials of the Office of Management and Budget. I did that yesterday.

Chairman ROTH. Yes.

Mr. MILLER. I made a copy of it. I think you have the original.

Chairman ROTH. That is correct. We do have a copy of the memorandum of recusal. This recusal provides that you will recuse yourself from participating in any particular manner in which the limited partnership in which you have an interest or the American Enterprise Institute has a financial interest. Is that correct?

Mr. MILLER. Yes, sir.

Chairman **Roth**. I also understand that the committee staff worked with the Office of Government Ethics, OMB ethics officials, as well as you, in drafting this recusal. I would like to enter a copy of the recusal memorandum into the record at this time.

[The memorandum referred to follows:]

MEMORANDUM

TO: Darrell Johnson, Deputy Associate
Director for Administration

FROM: James C. Miller III
9/23/85

SUBJECT: Financial Interests

In view of my nomination as Director of OMB, it is appropriate to advise you, in your capacity as Designated Agency Ethics Official, and other recipients of this memorandum, of certain of my financial interests.

First, I own a limited partnership interest in LPD Salt Lake Associates, a commercial milk processing and distribution facility in Salt Lake City, Utah. Second, I have been granted an indefinite leave of absence from the American Enterprise Institute in Washington, D.C.

I am advised by OMB Counsel that particular matters concerning the foregoing financial interests do not normally come before OMB. Nonetheless, if and when I am confirmed as Director of OMB, I agree to recuse myself from participating in any particular matter in which LPD Salt Lake Associates or the American Enterprise Institute has a financial interest, as defined in 18 U.S. Code Section 208 and the regulations thereunder.

By this memorandum, I am instructing members of the OMB staff not to refer such matters to me. In this regard, doubts should be resolved in favor of non-referral, pending consultation with and approval by OMB Counsel.

cc: Deputy Director
General Counsel/Counsel to the Director
Associate Directors
Administrator for Information and Regulatory Affairs
Deputy Associate Director for Natural Resources
Chief, Agriculture Branch

Chairman **Roth**. Do you know of any reason, personal or otherwise, that would in any way prevent you from fully and honorably discharging the responsibilities of Director of the Office of Management and Budget?

Mr. **Miller**. No, sir, I do not.

Chairman **Roth**. Do you agree, without reservation, to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed?

Mr. **Miller**. I do.

Chairman **Roth**. In their August economic update, the Congressional Budget Office estimates that the fiscal year 1986 deficit will be $175 billion, assuming that all the savings of the budget resolution are enacted. Deficits of this size indicate to me that major budget reduction is still needed.

How large should it be, and where should we be looking for cuts?

Mr. **Miller**. Mr. Chairman, I agree the budget deficit is too large. We need to deal with it; we need to deal with it with an affirmed resolve. I think it is important that we not deal with it in a propitious manner, to close the deficit through trying to raise taxes or trying to seek out budget reductions that might, through cavalier efforts, hurt the economy, or hurt those people who are dependent upon the largess of the Federal Government.

It is not easy to identify across the board exactly where cuts need to be made. I think each program of the Federal Government needs to be looked at very carefully, and I think many of them can be cut without substantially impairing either the economic engine that we have in our economy or the people that are dependent, again, upon the largess of the Federal Government.

Chairman **Roth**. Would you agree with remarks made by your predecessor in a speech to the New York Stock Exchange that, "Congress and the administration have lost the window of opportunity to solve the budget deficit"? If not, why?

Mr. **Miller**. Well, if that window is closed, Mr. Chairman, I think we need to bust a hole right through the wall, because we can't afford to let this matter lay.

Chairman **Roth**. During this administration, the Pentagon received, with congressional approval, large budget increases. However, in the past 2 years, Congress and the Defense Department have found large amounts of unexpended money, due to overestimating the rate of inflation in the defense budget.

How can we correct that situation and ensure——

Mr. **Miller**. Mr. Chairman——

Chairman **Roth**. Please proceed.

Mr. **Miller**. Mr. Chairman, the Packard Commission is working diligently on these matters. I would anticipate OMB working very closely with them, but also as an independent auditor of the efforts of the Defense Department to get spending under control and improve its management efficiency. I know the Secretary of Defense is committed to rooting out fraud and waste wherever it can be found in the Defense Department's budget. We need to get the maximum bang for our buck in the Defense Department, as anywhere else.

Since defense comprises a rather substantial portion of our budget, we obviously need to look there for some savings. On the other hand, as the President has noted, we need to maintain a very strong defense posture for this country. And without compromising that defense posture for our country, I think we can find ways of saving resources in the Defense Department's budget.

Chairman ROTH. One of the things that this committee will be looking at soon, together with the Budget Committee, is ways to reform the congressional budget process. There has been a great deal of dissatisfaction expressed with these procedures.

I wonder, would you care to comment at this time as to any areas where suggestions for improvements that might be made?

Mr. MILLER. Mr. Chairman, I respond to that question with some trepidation, because I am a little bit reluctant to suggest to the Congress how to organize its affairs.

The budget process that we have now, coming out of the recent act, has been disappointing in some measures. Obviously, the first budget resolution and the second budget resolution need to be done on time if the process is to work efficiently and effectively, as its drafters had originally proposed.

Whether you go from here to substantial changes at the moment, I'm not sure. I do believe, however, that it would be very good if we could have some kind of social contract between the House and Senate that we would approach the problem of reducing the deficit over the next several years in an orderly fashion. That would be very good.

As for the exact procedures that might be used, perhaps the best thing that might be done now would be to get more commitment here on the Hill to follow the standards enunciated in the act in terms of the budget resolutions.

Chairman ROTH. As you well know, the Office of Information and Regulatory Affairs in OMB was established by Congress in 1980 by the Paperwork Reduction Act. As the first Director of OIRA in the current administration, no doubt you were very much involved in shaping that Office as the Government's clearinghouse for all new or revised regulations proposed by the executive agencies.

We understand that the number of new regulations has been reduced dramatically since 1980, and that about 70 to 80 OMB staff members have been devoting their full-time efforts to this work. That is about 15 percent, I gather, of OMB's total work force.

Would you expect to continue this level of OMB commitment to regulatory oversight? What changes in OMB's regulatory review process would you anticipate making?

Mr. MILLER. Mr. Chairman, as I am sure you know, the Office of Information and Regulatory Affairs has additional responsibilities other than just the regulatory review process. But I do believe that the program has worked very well, and I would anticipate its continuing.

I look forward to a colloquy with Senator Gore on this issue. I know he has some questions, and Senator Eagleton may well have questions, as well, about how the process works. I have an open mind about that. But in terms of the overall level of effort, I think it is approximately correct.

Chairman ROTH. A few years ago, GAO criticized OMB for not devoting sufficient attention to implementing information management requirements of the Paperwork Reduction Act, although I will say GAO's last report was more encouraging.

Will you ensure that a proper balance is maintained in OIRA between the regulatory oversight and information management responsibilities so that this recently reported progress will continue?

Mr. MILLER. I will.

Chairman ROTH. I believe my time is almost up. I think Senator Cohen, you were next?

Senator COHEN. Thank you very much, Mr. Chairman. While I do not have the same experience as Senator Mattingly and Senator Gramm in working with Dr. Miller, I accept his reputation for intelligence and integrity wholeheartedly.

I would like to talk a little bit, Mr. Miller, about your role with the FTC. On July 23, the Federal Trade Commission issued a lengthy report recommending against the imposition of any relief for shoe imports, and you were Chairman of the FTC at that time. As I recall, Senator Danforth, who was chairman of the Senate Commerce Committee, which has jurisdiction over the FTC, strongly criticized your issuing that report. His language, as a matter of fact, said that,

> The question of international trade is wholly outside the jurisdiction of the FTC. The clear intent of Congress is that the FTC has no authority whatever to get involved in studies or examinations of putting out reports or analyses on trade matters.

Why did the FTC, in fact, exceed its jurisdiction to involve itself in international trade matters?

Mr. MILLER. Senator Cohen, I take issue with the premise. I don't believe Senator Danforth was exactly correct when he said that the FTC had no authority to issue the report. I think section 6 of the Federal Trade Commission Act gives the President the right to solicit any kind of information from the Federal Trade Commission, and as you know, the ITC process is part of what ends up in the executive branch.

Chairman ROTH. Would you pull the microphone a little closer?

Mr. MILLER. Excuse me.

Also, as you may know, in the laws of the land, there are quite numerous specific references to the various agencies soliciting the opinion of the Federal Trade Commission about a very broad variety of matters. If I'm not mistaken, I believe the statute under which the International Trade Commission operates specifically indicates that they should solicit the views of the Federal Trade Commission. I will be glad to give you, for the record, some additional and maybe more precise information on this.

Senator COHEN. Who requested the report?

Mr. MILLER. I do not know whether the International Trade Commission specifically solicited the report or whether we issued the report as an ordinary intervenor in that proceeding. We have had, from time to time, numerous indications from members of the ITC.

Senator COHEN. The ITC would not have requested this study since it already had made its recommendation by July 23.

Mr. MILLER. Well, perhaps I'm confused on this. I think that the Commission had been, was a party in this proceeding and had followed up. Come to think of it, I think that this particular report was in response to an inquiry or a request from Special Trade Representative Yeutter for information and recommendations from interested parties, especially those that had participated in the ITC proceeding.

Senator **Cohen**. After the ITC had already made its investigation?

Mr. **Miller**. Right.

Senator **Cohen**. Ambassador Yeutter made this request?

Mr. **Miller**. Yes, and again, section 6 of the Federal Trade Commission Act, if I'm not mistaken, provides authority for the Commission to make reports to the President.

Senator **Cohen**. Are you saying either Mr. Yeutter requested the FTC report or you did it on your own initiative?

Mr. **Miller**. Either way would have been thoroughly consistent with the law.

Senator **Cohen**. Was such a request made for the *Harley-Davidson Motorcycle* case?

Mr. **Miller**. I do not recall. I can provide that for the record.

[Information referred to follows:]

The FTC did not receive a request to comment on the ITC's investigation into motorcycle imports. While the FTC could nevertheless have commented in the proceeding, a decision was made not to do so. In contrast to the shoe imports case, the FTC had no significant history of research and expertise in the motorcycle market.

Senator **Cohen**. I don't recall the Federal Trade Commission becoming involved in the *Harley-Davidson Motorcycle* case when the administration granted relief. I just wondered about the selective intervention of the FTC when it serves somebody's purpose.

Mr. **Miller**. Well, we have been involved in a number of matters before the ITC. As you know, Senator, one of the mandates of the Federal Trade Commission is to protect consumers and protect competition. We feel that that is an area in which there are keen interests of consumers and competition, that is, with respect to restraints on international trade.

Senator **Cohen**. But your report went a bit further than that. You actually recommended trade adjustment assistance for the shoe worker.

Mr. **Miller**. Well, what we suggested was that if—I think it was appropriate in the context. The question was drafted in such a way that if there is going to be some remedy for this problem, what should that remedy be? Our suggestion was, as I recollect, that trade adjustment assistance would have less adverse effect on consumers and on competition than would, say, a tariff or an import quota or something of that nature.

Senator **Cohen**. Would you make that same recommendation as Director of OMB?

Mr. **Miller**. If given the same facts, yes, I would; yes.

Senator **Cohen**. See, part of the problem is that the administration is having it both ways. On the one hand, it is saying no relief for the shoe industry, "You are better off with trade adjustment assistance." However, the administration position is to terminate trade adjustment assistance.

So I find this industry or any other industry in some precarious situation where the administration is speaking out of two sides.

"Go to the trade adjustment assistance, and we are terminating that program as of September 30, by the way."

Mr. **Miller**. Senator Cohen, you are exactly right. It does seem inconsistent.

I would say this. I would give consistent advice to the President on such matters. I think the trade adjustment assistance that we were looking at was from other sources than the Trade Adjustment Assistance Act.

Senator **Cohen**. Last year, the Congress passed into law the Competition in Contracting Act. The President signed it.

At the time, the President expressed some reservations about certain provisions of the bill, but the President, nonetheless, did sign the bill, which was designed to get at some of the problems that Chairman Roth has talked about in terms of contractor competition, reducing fraud, waste, abuse, et cetera.

Shortly after it was signed into law, the former Director of the OMB issued a directive, a memorandum, ordering all federal officials to ignore certain provisions of the law because the Justice Department thought they were unconstitutional, even though no court had ruled those provisions unconstitutional.

Senator Gramm has indicated, and I accept this, knowing your reputation, that you have been successful in carrying out the letter of the law. The question I have is, Would you make a recommendation that any Federal officials ignore certain provisions of a law that has been passed by Congress and signed by the President?

Mr. **Miller**. That's a very complicated question on a complicated issue, Senator. Of course, part of the oath of office is to uphold the Constitution. If you believed, truly, that a portion of a law were adverse to the Constitution, I don't see how a public official in good conscience could carry out that provision.

Senator **Cohen**. No, no; the decision to sign the bill into law is the real test, isn't it? Once the President puts his stamp of approval, saying, "I don't like certain provisions and I might question them, but I am going to sign this bill into law," it seems to me the issue is whether you or anybody within the administration can subsequently question the constitutionality of the laws in the absence of a court ruling. It seems to me you have to uphold the letter of the law.

Mr. **Miller**. Well, I would certainly defer, I think, to the legal scholars at the Department of Justice and those who would guide me in such a case. But I do recognize that the Constitution is the supreme law of the land, and all others are subservient to it.

Senator **Cohen**. A court subsequently ruled that the law, in fact, was constitutional and said that the executive branch's decision to deliberately disobey the law flatly violates the express instruction of the Constitution that the President "take care that the laws be faithfully executed." I think that we have to arrive at some sort of an understanding as to whether or not you believe that once the President signs a bill into law, in the absence of a court decision is it your belief that the administration has an obligation to carry out that law?

Mr. **Miller**. Well, I would say, given the language you have just read, that would be an admonition to do as you suggest. As I indicated, I would defer, I think, to the legal scholars on what was required.

Senator **Cohen**. So you would recommend that we carry out the law in the absence of an opinion of legal scholars. Who would they be, the Justice Department?

Mr. **Miller**. The Justice Department, primarily. The Office of Legal Counsel does that.

Senator **Cohen**. And if the Justice Department recommended that a certain provision was unconstitutional, you would then feel obligated to issue such a memo?

Mr. **Miller**. If the Office of Legal Counsel concluded that I would be violating the Constitution itself by engaging in a certain act, I would not engage in that certain act. I would have sworn to uphold the Constitution.

Senator **Cohen**. Do you think that the Justice Department and the Office of Legal Counsel have an obligation to make that determination before the President signs the bill into law? Isn't that the way it should be done?

Mr. **Miller**. It usually is done that way, Senator.

This is a hypothetical. I would have to see the facts.

Senator **Cohen**. It is not hypothetical. We had an exact case involving the Competition in Contracting Act. What I am trying to get at is what is the orderly processing of the rule of the law so we don't have a President signing something into law and then later, having a postscript added by the Justice Department saying, "By the way, we don't like section 201," or whatever the section might be, "and don't enforce it." It seems to me that erodes respect for the law.

Mr. **Miller**. I would just have to know the facts, and I am not trained as a lawyer, Senator Cohen. I would have to defer, I think, judgment to officials that would counsel me on that matter.

Senator **Cohen**. Mr. Miller, in April, you gave a speech before the Association of Private Enterprise Foundation in which you said, "Much of the current handwringing of the Federal deficit reflects the old Government-centered thinking—the outlook repudiated at the polls in 1980 and again last November."

Senators Gramm, Rudman, and I are about to hold a press conference on a new deficit reduction plan. Is he part of that old Government-centered thinking in his concern about the deficit?

Mr. **Miller**. No; I would not characterize it that way.

What I had in mind, I think, in writing that piece was the tax-tax, spend-spend model that had been in vogue.

Also, I think it is important that we recognize that fiscal policy can have incentive effects on aggregate economic activity. The rather simplistic notion of trying to regulate the economy through manipulating aggregate demand by fiscal policy, I think, is a worn-out model.

Senator **Cohen**. Let me ask you another question. I think in response to Chairman Roth, you indicated that you are as concerned about the deficit as the chairman and others were and that you didn't think we should take any hasty, precipitous action. If I were to suggest to you that it is unlikely that there would be substantial reductions in entitlement programs in the next year or two, would you be in a position to tell the committee the cuts that you would recommend? You indicated that many programs can be cut substantially without impairing the commitment of the Federal Government. Would you recommend any cuts in the entitlement programs in order to reduce the deficit?

Mr. MILLER. I think that I would follow the President's policy. The policy that the President has spoken on the issue of social security, for example, I would follow his lead in that. I think that some restraints in entitlements programs might well be looked at by the administration and by Congress.

Unless the President would put something completely out of bounds, I would not.

Senator COHEN. So, if there are to be no tax increases and no real reductions in entitlement programs, how do we get the deficit down?

Mr. MILLER. Among the things that we look for is growth in the economy. We also look for ways of managing the economy and the Federal Government better in order to deliver services without as great expenditure of the taxpayers' resources.

Senator COHEN. So you believe we are going to grow our way out of this $200-some billion deficit?

Mr. MILLER. Senator, I didn't say that. I said that is among the things that we would look for as ways of narrowing the deficit.

Senator COHEN. One final question. What is your feeling about OFPP, the Office of Federal Procurement Policy?

Mr. MILLER. I think OFPP has a potential for doing a great deal of good in reducing the cost to the taxpayer of securing the resources that Government uses, and I pledge to invigorate that organization and make it work well.

Senator COHEN. Do you intend to urge the administration to appoint a head of OFPP? It has been vacant now for about 8 months.

Mr. MILLER. Right. I would encourage the President to make an appointment right away.

Senator COHEN. That is all I have, Mr. Chairman.

Chairman ROTH. Thank you.

Senator Gore.

Senator GORE. Thank you very much, Mr. Chairman. I have a number of questions about the Executive orders and the regulatory review process. But before I do that—before I get to those questions—I would like to ask you a few questions about what I believe is going to be your most important responsibility; that is to help the President and the country to deal with the deficit problem.

First of all, do you agree that it is an extremely serious problem for our country?

Mr. MILLER. I do.

Senator GORE. Do you believe that there is a direct connection between the size of the deficit and the value of the dollar?

Mr. MILLER. Let me say that I think there is a connection. I cannot quantify that connection for you today.

I have read some of the research on the matter. As you know, the experts vary. Some say there is a direct causality; that is, it is almost a one-to-one correspondence between the size of the budget deficit and the size of the trade deficits.

There are others posing models that are elegant and internally consistent that say that there is no connection at all. I believe that probably the truth lies somewhere between—that the trade deficit is aggravated by our budget deficit, in part because increases in the budget deficit may have the tendency to at least at the margin raise interest rates and therefore attract capital from abroad, which is the reverse of simply the trade deficit itself.

Senator **Gore**. The majority of the economists I have read on this subject seem to agree that it is the major cause of the trade deficit, although there are certainly other causes, as well.

Do you agree that the President of the United States, working with his Director of the Office of Management and Budget, has a responsibility to propose solutions for the deficit problem?

Mr. **Miller**. Oh, yes.

Senator **Gore**. So you do not believe it would be adequate for the President to submit a budget proposal which contained a deficit of $175 to $200 billion and then simply turn around the next day and shake his finger at the Congress and say, "You better not enact a deficit of that size"?

Mr. **Miller**. Mr. Gore, I don't want to agree with that statement, because I don't believe it. I don't believe that—the predicate, I think, the implicit predicate in your question was not what the President did. The President's budget for 1986 did incorporate substantial savings and moved toward narrowing the deficit significantly, and I know that he is committed to doing that today for the 1987 budget.

Senator **Gore**. What size deficit did he recommend in that budget?

Mr. **Miller**. Well, the budget deficit was rather substantial.

Senator **Gore**. $175 billion?

Mr. **Miller**. Yes, it was, depending on whether it was the CBO baseline or OMB's baseline or someone else's. But it was in that neighborhood, yes.

Senator **Gore**. Do you think the Director of the Office of Management and Budget has a responsibility to recommend to the President ways to dramatically reduce that deficit in the next fiscal year's proposal?

Mr. **Miller**. Well, I do.

Senator **Gore**. How far do you think you can get it down in your recommendation?

Mr. **Miller**. That is a good question. First let me say, I have not reviewed personally the budget in the way that I would before making such a decision or making such a recommendation to the President, so I cannot tell you specifically.

But I think significant progress could be made.

Senator **Gore**. Following up on an earlier question, you don't really believe that we can grow our way out of this deficit, do you?

Mr. **Miller**. Well, I don't think I gave that answer. I said that is one of the things we would look for.

Senator **Gore**. Just for the record, do you believe we can grow our way out of this deficit?

Mr. **Miller**. There are realistic assumptions that could be made whereby, if you did not increase expenditures, that indeed, over a long, long period of time, revenues might rise sufficiently to cover all of the Federal Government's expenditures.

Senator **Gore**. Two hundred years? [Laughter.]

How many years?

Mr. **Miller**. You read the same literature I have read. I have not made the analysis myself. But there are opportunities for increasing total revenues through growth.

Senator **Gore**. Do you think we can grow our way out of this deficit in this century?

Mr. **Miller**. I think I answered, Senator Gore, by saying that this is one of the things that I would look forward to as a means of reducing the deficit. All the estimates show that growth of the economy does increase total revenues. If you hold total spending constant and you increase total revenues, the deficit goes down.

The question is the amount of time. I do not know. Again, you read the same literature that I read. It varies all across the map, but it would probably be unreasonable to assume that mere growth, mere growth in the economy would eliminate the deficit within the next decade. That alone——

Senator **Gore**. It, probably, would be unable to assume that.

Mr. **Miller**. Yes.

Senator **Gore**. That is the answer I was really looking for, because the Congress and the executive branch both share a responsibility for this problem, and we both have to solve it. One of the obstacles has been the tendency of some to live in a fantasy-land, where growth alone will solve the problem. Economists that I have talked to say the correct way to say it is that there is less than a 5-percent chance that growth alone will solve this problem in the next 10 to 15 years.

Mr. **Miller**. Let me say, the deficit is the difference between revenues and expenses. To know how to answer that question, you have to make some kind of assumption about what expenditures will be. If expenditures in nominal terms do not change, I think we could easily grow our way out of the deficit, but that is an unrealistic assumption. Expenditures will also increase.

I think what you may be referring to is the argument that a simple decrease in tax rates would have such a substantial effect that it would increase total Government revenue, and I have not seen any evidence of that.

Senator **Gore**. I wasn't referring specifically to that.

Mr. **Miller**. I see.

Senator **Gore**. I am referring to numerous efforts to escape the reality of the problem by saying that growth alone will solve it.

Let me turn now to the subject of Executive Order 12291. I was listening closely to my colleague, the Senator from Maine, earlier, when he asked you about a problem he had experienced with the Competition in Contracting Act.

I had a similar problem in the House. I authored a bill called the Infant Formula Act of 1980. The law was passed. The President signed it. It was designed to protect infants against the consumption of formulas that would not sustain normal growth and development. There had been a number of serious problems.

That law, though passed and signed by the President, was not implemented because the regulations needed from FDA to implement the law had to be reviewed by OMB.

Now, the person at OMB who reviewed these regulations had no idea whatsoever about health, medicine, or any of the specialities that were studied by those who actually dealt with the nuts and bolts of those regulations to implement the law. However, this person at OMB was responsive to the three large corporations that dominate that particular industry, and they fought the law; tried to keep it from passing. They lost overwhelmingly.

But they were able to pick up the telephone and call OMB, and OMB said, "Oh, these companies don't like these regulations, so we will stop them." FDA was then ordered not to implement the law, and the regulations disappeared into a black hole at OMB, where they remained for a long time.

During the process, during this period of delay, another incident occurred where 2 million cans of defective infant formula were mass distributed, and threatening the lives of those children consuming it if they continued to consume it for a couple of weeks, and it is not accompanied by a case and have infant formula stored up.

FDA testified that if the law had been implemented, if the regulations had been enacted, that incident never would have taken place. There are numerous, numerous instances where laws have been passed by the Congress and the executive agencies have been directed to implement those laws according to procedures outlined, and then OMB has quashed the process.

I don't think that is right. I don't think that is right at all. Just to take one example, when regulations are being considered, there are certain procedural guidelines. You have to keep a record of with who you had discussed the substance of the regulation.

There is an effort to make sure it is a fair and open process.

Do you believe that those at OMB who take it upon themselves to effect these regulations should also keep track of who they contact if a representative of one of these corporations calls him up and says, "This is terrible"?

Should he keep a record of that, or should it all be just in the dark? Shouldn't there be open disclosure of ex parte contacts at OMB under this process?

Mr. **Miller**. Well, let me say, Senator, it's hard for me to respond to some particulars, because I do not know the details of the case that you describe. I would take issue, from my knowledge of the way the process works, with the characterization that OMB simply called up and said, "Let's not move forward on these regulations because these companies object".

That is not grounds for making those objections. The objections——

Senator **Gore**. It, nevertheless, happened. That is what happened on the lead phase-down decision. There are others.

Mr. **Miller**. Well, let me say that——

Senator **Gore**. I will get back into the lead phase-down and give you a chance to respond to that.

Mr. **Miller**. Let me say the executive order, promulgated by the President, gives directions to the agencies as to the conditions under which they would issue regulations. It specifically provides, however, that if a regulation is required by law for the particular timing, the OMB review is irrelevant; they must move forward.

So I think that the problem that you may have addressed here is not with OMB but with the agency.

Time and again, when I was at OMB, agencies issued regulations that were mandated by law without OMB's having an opportunity to review them, specifically because the Executive order said that the OMB review process was not to operate in any way to restrain what was required by existing law.

Senator **Gore**. I will include for the record and give you a chance to comment, if you wish, a long list of deadlines that have been missed, where the agencies say, "It's not our fault. We gave them to OMB months ago, and they refused to get back to us; they won't let us go ahead."

This is the way this thing has operated. Now, what is the legal authority upon which Executive Order 12291 is founded?

Mr. **Miller**. The Constitution of the United States.

Senator **Gore**. Which article?

Mr. **Miller**. Article 2 of the Constitution.

Senator **Gore**. Are you relying upon the language requiring the President to "take care that the laws be faithfully executed"?

Mr. **Miller**. Yes; Let me—I think, undoubtedly, Senator, you have reviewed a copy of the Department of Justice's brief in what is known as the ethyl oxide case. Again, I am not a lawyer, but I would respond by reading just a couple of paragraphs into the record, I think, which would go to this point.

It says,

> Executive Order 12291 is designed to improve the regulatory process by requiring executive branch agencies to be more fully aware of the consequences of and alternatives to their proposed actions. There are two principal aspects of the order: First, the extent permitted by its enabling statute. An agency, an executive branch agency's regulations must conform to the subsequent requirements set forth in the order. The most important of these require an agency to maximize benefits to society and achieve its objectives by the least costly alternative.
>
> Second, in order to ensure that these requirements are complied with, agencies are subjected to discipline in preparing a regulatory impact analysis for all their major rules and regulations. This analysis must contain a variety of information, is intended to allow each proposed major rule to be analyzed in the light of the requirements identified in the order.
>
> Agencies must send copies of their regulatory impact analyses, along with all notices of proposed rulemaking and final rules, to the Director of OMB prior to the promulgation of the rules. The Director is given authority to review these documents based on the order's requirement to consult with agencies on preliminary analysis, a notice of proposed rulemaking and submit views on formal analyses and final rules. Agencies must consult with OMB upon the request and respond to the Director's views. They must also defer rulemaking during OMB's review or until they have responded to the Director's reviews.
>
> However, in establishing this procedure, the order makes clear that it shall not be construed as displacing the agency's responsibilities delegated by law. That is, the ultimate decision remains where Congress vested it, in the—with the agency heads.

That part about not displacing the responsibility delegated by law is part of the executive order itself.

Now, as to the question of authority, it says,

> The presence of authority to issue Executive Order 12291, insofar as its directs the executive branch agencies to conform their regulation to the broad policies outlined in the order, derives from its constitutional power to take care that the laws be faithfully executed.

This is out of article 2, section 3.

> This provision authorizes the head of the executive branch to supervise and guide executive branch officers in their construction of the statutes under which they act, in order to secure that unitary and uniform execution of the laws of article 2 of the

Constitution. It evidently contemplated investing general executive power in the President alone.

I would also cite Judge Wald's opinion in *Sierra Club* v. *Costle*. Judge Wald, appointed by President Carter to the District of Columbia Circuit Court of Appeals, wrote an opinion that came down after the executive order was promulgated that supported Presidential oversight. Also, I would mention that the administrative procedure section of the American Bar Association has, for the most part, endorsed the procedures that are contained in the order.

Finally, let me say that the Administrative Conference of the United States during 1980 and in December 1980, before there was any change of administration, indicated that the kinds of communications I think you may be talking about—excuse me. I think this goes to the question of the communications between the President and his appointees and heads of executive branch agencies.

But there is, as we have discussed in the past, a difference of opinion about this. This matter is before the court in the ethyl oxide case.

Of course, I would be bound by whatever the court decides.

Senator GORE. Mr. Chairman, I would ask unanimous consent. I know my time is long up.

Mr. MILLER. I'm sorry to take some of it.

Senator GORE. I will come back to this in the next round.

At this point in the record, I would ask unanimous consent to include important sections in the amicus brief in the case now from the House of Representatives, and also a pertinent comment on the *Sierra Club* case which I don't have time to respond to right now, but we will come back to it in the next round.[1]

Chairman ROTH. Without objection, so ordered.

Senator Eagleton.

Senator EAGLETON. Yes.

Not to belabor the budget point, but it is an important one. If, Mr. Miller, 70 percent of the budget is retirement programs, medical programs, defense and interest on the national debt, and if one puts aside interest on the national debt, which would be uncutable, because one does not default, doesn't it stand to good commonsense reason that if budget cutting is to take place, it has to take place in substantial part in the aforementioned areas of retirement programs and medical programs and defense?

Mr. MILLER. Well, Senator, I just simply would not—unless the President so dictated—I would not, in terms of my analysis, put anything out of bounds.

Senator EAGLETON. We are not going to talk about Presidential dictation. You are a well-qualified economist, have a distinguished career as an economist with distinguished credentials as an economist, but that is the background.

Seventy percent of the budget is in areas such as retirement and medical expenses and defense. Doesn't it stand to commonsense economic reasoning that those areas would have to be probed very heavily in order to come up with substantial budget cuts?

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[1] See p. 207.

Mr. **Miller**. It is difficult for me to answer that in a vacuum, because I don't know——

Senator **Eagleton**. We are not talking about a vacuum. We are talking about the budget. [Laughter.]

There are various categories in the budget, various items by category. A big one up here is called entitlements, humongous.

Mr. **Miller**. I understand.

Senator **Eagleton**. There is a big one down here called defense, humongous.

Mr. **Miller**. Right. Right.

Senator **Eagleton**. A big one here called medical expenses, Medicare and Medicaid and other things, real biggies.

Do we blindfold ourselves to those and say, now we will poke around down here, legal services? That is $250 million in the current budget. So you cut it to $200 million. Big deal.

Mr. **Miller**. It is more money than I will ever see.

Senator **Eagleton**. That is big bucks out of $200 billion in red ink. Don't you have to look where the big bucks are being spent?

Mr. **Miller**. The obvious answer is yes, you have got to look at the whole budget.

Senator **Eagleton**. That is what we want, the honest answer.

Now, do you favor a constitutional amendment to balance the budget?

Mr. **Miller**. Well, I favor some sort of constitutional amendment that would——

Senator **Eagleton**. How about the Reagan amendment? [Laughter.]

Mr. **Miller**. I think it has much to recommend.

Senator **Eagleton**. Do you want to take your direction from the President? Aren't you onboard on his constitutional amendment to balance the budget?

Mr. **Miller**. Well, I think the answer that I gave in the question that was given to me earlier went to what I perceive as an institutional bias toward spending.

Senator **Eagleton**. I am talking about my question. It is my turn.

Mr. **Miller**. Yes, sir, I understand.

Senator **Eagleton**. About the Reagan constitutional amendment to balance the budget.

Mr. **Miller**. I know the general outlines of the suggestion.

Senator **Eagleton**. You have been at OMB in previous years and at the FTC. You advised the President on shoe policies, as Senator Cohen brought up. You haven't been in this town with a hearing problem. The President has a constitutional amendment to balance the budget. You are with the President, or are you not going to give me another honest answer on that one?

Mr. **Miller**. Every answer I give you, Senator, is honest.

Senator **Eagleton**. I think you are with him, aren't you? He is the leader.

Mr. **Miller**. I am with the President on the balanced budget amendment, yes.

Senator **Eagleton**. All right. Would you support an amendment to his amendment which would have his amendment take effect any year during his term of office?

He has got 3½ years to go, roughly. Would you have that amendment become operative anytime during the 3½ years he has remaining?

Mr. **Miller**. I would not.

Senator **Eagleton**. You would prefer to have it for a future President, somewhere?

Mr. **Miller**. No, it's not for a future President. The problem is we are in a bind right now with rather substantial deficits, and I think it would be a mistake to take precipitous action and to balance the budget immediately.

Senator **Eagleton**. So do I. What year do you suggest it might take place?

Mr. **Miller**. Pardon?

Senator **Eagleton**. What year do you think it should take place?

Mr. **Miller**. I think we need to be thinking of a 4- or five-year time horizon in eliminating the deficit entirely. I would suggest that it effect some phasing out of the deficit.

Senator **Eagleton**. How about this kind of phasing for the next President of the United States: That if he serves 8 years, the next one, that he can add no more than $1 trillion to the national debt? [Laughter.]

Reagan has already added $1 trillion up to now; he will probably add at least another $600 billion. From George Washington to Jimmy Carter, it was $1 trillion. President Reagan has already matched every President of the United States. He will outdo them by another $600 billion. How about for the next guy that serves 8 years? "Fellow, no more than $1 trillion." [Laughter.]

It is phasing.

Mr. **Miller**. Senator, you know as well as I do that the budget deficit is the product of an interaction between the President and the legislature.

Senator **Eagleton**. Right.

Mr. **Miller**. They should share some of the blame.

Senator **Eagleton**. That gives you a little phasing room for everybody. We could ooze into it. [Laughter.]

All right. Let's move on.

Mr. **Miller**. Move and groove.

Senator **Eagleton**. In 1975, you were an economic adviser so far as the report to President Nixon was concerned. It is on your dossier?

Mr. **Miller**. Yes, sir, I think I was listed as an adviser.

Senator **Eagleton**. In Government regulations, I think was the title. In chapter V, you were the principal author?

Mr. **Miller**. Yes, it was a report to President Ford who had been in office only 2 months or so.

Senator **Eagleton**. OK, President Ford. In that chapter, you advocated further deregulation of banks and lending institutions, did you not?

Mr. **Miller**. I do not have a copy of the—I forget.

Senator **Eagleton**. Do you recall your chapter? How do you feel about further deregulation of banks and——

Mr. **Miller**. I feel——

Senator **Eagleton**. Tell me how you felt in 1975 and how you feel today.

Mr. **MILLER**. I feel the same way today. I think financial deregulation makes a lot of sense.

Senator **EAGLETON**. How, if you are going to deregulate all these guys while they are going down the tubes, the thrifts in Maryland and in Pennsylvania and Ohio and good old Continental, lovable Continental, Crocker, Seattle First, you are going to deregulate all these guys. How do you bail them out? If you are free, free, free; the request is for ultimate freedom, don't they have the freedom to fail?

Mr. **MILLER**. Yes.

Senator **EAGLETON**. OK. So you would not have bailed out Continental?

Mr. **MILLER**. I do not know the specific details. I was not close enough to answer.

Senator **EAGLETON**. Oh, now, wait a minute, Mr. Miller. It was all over the front page business sections. [Laughter.]

You just don't read the "FTC Monthly", now, do you? [Laughter.]

Mr. **MILLER**. No; I read a lot of things, but I have enough experience, Senator, in knowing the details of my own agency well enough that if I simply place a decision on the basis of what I read that——

Senator **EAGLETON**. There was a guy in Oklahoma, Penn-Square Bank and he wore a beanie with an airplane prop on the top of it. This was written up in three articles in the New Yorker. He ran through that bank in Penn-Square saying, "Go, go, Penn-Square, lambda, lambda, lambda." He was a Rotarian and a junior chamber of commerce member.

He went up to Chicago and said, "Continental, we can do a lot of energy loans down here," and finally got Continental on the line for over $1 billion worth of energy loans they had not inspected. The papers had not been transferred backing up the loans from Oklahoma, the suburb where Penn-Square was operating out of, up to Continental, and Continental went down the tubes until they were bailed out.

It was a Reagan bailout of Continental just as it was a Carter bailout of Chrysler; whoever was in when Lockheed was bailed out, Nixon, I guess it was.

Now, Reagan bailed them out. Why aren't they free to fail?

Mr. **MILLER**. Senator, as a generic proposition, I believe that people have a right to fail as well as to succeed.

Senator **EAGLETON**. If they had asked your advice as an economist, you have been around in advising the administration, you would say let them go down?

Mr. **MILLER**. Well, let me say I think that it is important for the integrity of our financial system that deposits be insured, that is, that individuals who have deposits be insured.

But those who take the actions and make risky investments, I think they ought to be held accountable for their actions.

Senator **EAGLETON**. Even if it had triggered a staggering strain of financial events insofar as correspondent banks were concerned?

Mr. **MILLER**. That is the problem. That is the reason I demurred on simply saying I would have gone the other way, because I don't know all the data.

Senator **Eagleton**. These abstract theorists that write economic theory on cocktail napkins out on the west coast, that is why abstract theory sometimes doesn't play in the real world, because the truth is if Continental had been permitted to go down the tubes, as you generically seem to think is correct, there would have been, as a result thereof, financial chaos, massively affecting credit markets of the United States. That is why Reagan intervened.

Mr. **Miller**. That's—it's a difficult situation.

Senator **Eagleton**. It sure is.

Mr. **Miller**. That is the reason I demure a bit on just that sort of abstract theory. You have to know the facts——

Senator **Eagleton**. You have to know what you are bailing out.

Mr. **Miller** [continuing]. To know what the right answer is. If I can, I was recalling, and one of my assistants just gave me a copy of a speech I gave this summer——

Senator **Eagleton**. Let's put it in the record, because you took 8 minutes responding to Mr. Gore's question.

Mr. **Miller**. Fine. Fine.

[The information referred to follows:]

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

DEREGULATION IN THE COMMUNICATIONS AND FINANCIAL SERVICES INDUSTRIES

by

JAMES C. MILLER III*

CHAIRMAN

FEDERAL TRADE COMMISSION

before the

ANTITRUST SECTION

of the

AMERICAN BAR ASSOCIATION

HAMILTON, BERMUDA

JULY 12, 1985

Thank you very much. As some of you may know, my entree into the deregulation "movement" was through my work on transportation issues. From an economist's perspective, deregulation of transportation -- in particular, trucking and airlines -- was not particularly controversial. In neither case was regulation serving to restrain monopoly power. On the contrary, in both cases it was fairly obvious that the effect of regulation was to restrain competition in an industry whose basic structure fostered competition. Economists, therefore, were confident that deregulation would produce the desired outcome -- greater allocative and operating efficiencies -- and that the results would become noticeable fairly quickly and with a minimum of disruption. This, I think, has generally been the case.

Economists are less unanimous concerning the appropriate degree and speed of deregulation for communications and for banking. Deregulation of the interexchange telephone market is complicated, among other things, by the fact that we started out with service provided by a regulated monopoly. And banking is plagued by the very different problems posed by the federal deposit insurance system.

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* The views expressed are my own. They do not necessarily represent those of the other Commissioners.

Communications

There is probably no better illustration than the telephone industry of the problems inherent in trying to determine efficient prices and hold down costs for a regulated monopoly.

Efforts to set economically rational rates are frustrated by the existence of large common costs and the resulting inability of regulators to allocate total costs to individual services in a manner that is not, at least to some extent, arbitrary. Moreover, with restricted entry an inefficient rate structure can be maintained indefinitely, because new firms can't enter in response to prices that are set too high. Thus, there is little reason to have confidence that regulation-determined prices will be efficient -- even before allowing for the influence of a variety of political pressures that make themselves felt during the ratemaking process.[1]

Because of the large economic costs associated with trying to maintain interexchange telephone service as a regulated monopoly in the face of potential entrants, the Federal Communications Commission (FCC) and the courts have gradually allowed competition to develop.[2] As a result, business firms and consumers now have a greater choice of equipment and services, and prices have fallen in markets where competitors have entered. Moreover, we do not appear to be foregoing economies of scale or scope by permitting more than one company to provide telephone service.[3]

However, although we now have some competition in the long-distance telephone market, AT&T remains subject to rate regulation. Therefore, we are still incurring many direct and indirect regulatory costs, even though there is little reason to believe that regulation produces significant offsetting benefits, given the current competitive structure.

At the risk of oversimplifying a complex issue, there are two major fears concerning what would happen if AT&T were granted greater pricing freedom: (a) some prices would increase, and (b) some would go down. Let's take the second fear first. And, keep in mind that no one knows what any of these telephone services really costs and what, therefore, efficient prices would be.[4]

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[1] See, for example, Paul W. MacAvoy and Kenneth Robinson, "Losing by Judicial Policymaking: The First Year of the AT&T Divestiture," Yale Journal on Regulation (1985), pp. 225-262.

[2] See, for example, Richard E. Wiley, "Regulatory Change and the Promotion of Competition," in Harry M. Shooshan III, ed., Disconnecting Bell: The Impact of the AT&T Divestiture (New York: Pergamon Press, 1984), pp. 23-46.

[3] See, for example, David S. Evans and James J. Heckman, "A Test for Subadditivity of the Cost Function with an Application to the Bell System," American Economic Review (1984), pp. 615-623.

AT&T's rivals fear that greater pricing flexibility would enable AT&T to lower its prices in markets that were being contested. In fact, less than a month ago (on June 17th), a group of them petitioned the FCC to freeze AT&T's ability to offer new bargain-pricing plans. Of course, lower prices are what competition is all about and are to be encouraged -- unless, of course, the behavior is predatory.

As you know, economists are generally skeptical of predatory pricing arguments because it is generally not rational for firms knowingly to incur losses. However, many economists believe such behavior is more plausible in the case of a regulated firm that faces an overall rate-of-return constraint.[5] If the firm has unexploited monopoly power in some markets, but faces competition in others, it might find it advantageous to lower prices below costs in its competitive markets, and cover those losses by raising prices in its monopoly markets.

Similar fears of predatory cross-subsidization lie behind the FCC's 1980 decision in Computer II, which permitted AT&T to offer "enhanced" (i.e., computerized) services on an unregulated basis, but only through a separate subsidiary.[6] As you may know, the FCC is currently reevaluating this policy.

Of course, it is difficult, if not impossible, for a regulatory authority to identify a cross-subsidy if costs can't be measured accurately. Therefore, it would seem best to solve the problem by removing the incentive to engage in cross-subsidization, which in this case stems from the existence of the rate-of-return constraint imposed by regulation. Removing AT&T's regulatory constraint would discourage predatory cross-subsidization -- to the extent it exists -- because in an unregulated world AT&T would have nothing to gain and something to lose by engaging in such behavior.

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[4] See, for example, Robert W. Crandall and Bruce M. Owen, "Economic Implications of the Divestiture," in Shooshan, ed., Disconnecting Bell, pp. 47-70, esp. pp. 54-55.

[5] See, for example, Crandall and Owen, in Shooshan, ed., Disconnecting Bell, p. 51. For a contrary view, see William A. Brock and David S. Evans, "Predation: A Critique of the Government's Case in U.S. v. AT&T," in David S. Evans, ed., Breaking up Bell: Essays on Industrial Organization and Regulation (New York: North Holland, 1983), pp. 41-59, esp. pp. 54-56.

[6] See William J. Baumol and Robert D. Willig, "Telephones and Computers," Regulation (March/Apr 1 1985), pp. 23-32; and Florence D. Seltzer, Divestiture and the Separate Subsidiary Requirement (Washington, D.C.: Federal Communications Commission, Office of Plans and Policy, 1984).

Giving AT&T pricing freedom obviously would not alleviate fears of monopoly pricing. However, I think a variety of factors suggest that AT&T's market power may be quite small and is getting smaller, despite its very large market share.[7]

AT&T's competitors are expanding rapidly and presumably will continue to do so, and consumers are increasingly signing up with the new long-distance carriers. Moreover, large corporations and resellers, who are major purchasers of long-distance services, have the ability and incentive to shop around carefully for the best deal. Any attempt by AT&T to raise prices significantly above costs for any appreciable period of time would likely result in a rapid loss of market share.

This is not to say that deregulation poses no risks. But the point of the AT&T divestiture was to facilitate competition and eliminate the need for regulation in the interexchange market. That sometimes ill-defined goal of "equal access" is for all practical purposes almost here. No matter how fast we moved, it is unlikely that we could have deregulated AT&T before equal access arrived. But now we can and should begin the process.

Banking

Turning now to financial deregulation, I think that recent events indicate it is going to be difficult to bring about a banking system devoid of government-induced inefficiencies, even though we have made a substantial amount of progress over the last few years.[8]

Our most significant accomplishment to date -- which, incidentally, might be viewed as a positive by-product of the recent period of high inflation -- has been the elimination of controls over interest rates, a set of regulations which caused serious distortions in financial markets and redistributed billions of dollars annually from some savers to some investors.

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[7] For a discussion, see Michael L. Katz and Robert D. Willig, "The Case for Freeing AT&T," Regulation, July/August 1983.

[8] For reviews of the current status of financial regulatory reform, see, for example, Kerry Cooper and Donald R. Fraser, Banking Deregulation and the New Competition in Financial Services (Cambridge: Ballinger Publishing Company, 1984); and Alan Gart, Banks, Thrifts, and Insurance Companies: Surviving the 1980s (Lexington: Lexington Books, 1985).

Not as much progress has been made in two other areas of major interest. We still retain some barriers to interstate banking, and depository institutions are still precluded from offering securities- and insurance-related services, among others.

As would be expected, geographic and product deregulation is resisted by the incumbents in their respective markets. In addition, and notwithstanding the benefits of diversification, there is concern that permitting banks into new activities would mean higher risks and increased pressures on an already strained federal deposit insurance system -- an institution which itself is in need of reform, as documented most recently by the Vice President's Task Group on Regulation of Financial Services.[9] In fact, even some economists, normally the strongest proponents of deregulation, are of the view that doing something about deposit insurance is a prerequisite to further banking deregulation.[10]

While any insurance coverage can increase the tendency of the insured to take risks, federal deposit insurance exacerbates the problem because its premiums are not risk-related. To alleviate this problem, bank regulatory agencies attempt to constrain bank risk-taking by supervision and direct regulation -- in particular, a requirement that financial institutions maintain a certain proportion of equity capital. The theory is that if stockholders have something to lose, this will act as a check on excessively risky activities.

Recent developments have actually increased incentives for banks to take excessive risks. First, the government's behavior in the Continental Illinois bailout, as well as other actions, signaled a willingness to stand behind uninsured as well as insured deposits, at least those in large banks.[11] As long as some deposits are uninsured, a bank at least has to pay a premium for those deposits.

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[9] See, for example, Blueprint for Reform: The Report of the Task Group on Regulation of Financial Services (Washington, D.C.: Government Printing Office, 1984), pp. 82-85.

[10] See, for example, John Kareken, "The First Step in Bank Deregulation: What About the FDIC?," American Economic Review (May 1985), pp. 198-203.

[11] See Frederick T. Furlong, "Market Responses to Continental Illinois," Federal Reserve Bank of San Francisco Weekly Letter (August 31, 1984).

Second, and also as a result of Continental Illinois, it appeared to many that even the stockholders of troubled banks may receive some protection.

Third, every recent banking crisis -- for examples, those in Ohio and Maryland -- has been dealt with by incorporating the banks into the flawed federal deposit insurance system.

Thus, we have diluted seriously all three mechanisms available to provide banks an incentive to avoid excessively risky undertakings: (a) that they may have to pay a premium to attract deposits; (b) that they may have to pay a premium for insurance coverage; and (c) that their stockholders may lose money.

I am skeptical that we can solve these problems by adjusting federal insurance premiums for risk, for much the same reason that I question whether government can determine efficient prices for telephone services. As appealing as such proposals sound, the government is simply not very good at mimicking the competitive marketplace.

You probably won't be surprised to hear that I am more attracted to proposals to place greater reliance on private insurance, although many whose judgement I respect questioned their feasibility, and certainly that doesn't seem to be the direction in which we are moving.[12] Obviously, a system in which the government de facto provides 100-percent coverage is not conducive to the development of private insurance. So a first step might be to effectuate a reduction in coverage -- down to the de jure $100,000 limit or perhaps lower -- to provide more opportunity for private insurers.

In closing, let me say that I recognize the government has certain responsibilities in assuring the stability of the banking system. If, however, it carries out these responsibilities by covering most of the risks that normally would be borne by private parties, the costs will be very large -- in terms of both misallocation of resources and taxpayer exposure. There are no easy answers to these problems, but neither will they go away.

Thank you very much!

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[12] For a discussion, see Eugenie D. Short and Gerald P. O'Driscoll, Jr., "Deregulation and Deposit Insurance," Federal Reserve Bank of Dallas Economic Review (September 1983), pp. 11-22.

Senator **Eagleton**. It can be made a part of the record. Let's move on. Have you heard of an economist named Friedrich von Hayek?

Mr. **Miller**. Yes.

Senator **Eagleton**. I hadn't heard of him until my staff gave me this. I just know Lester Thurow because he is in Newsweek or something. Von Hayek is a Nobel Prize winner and is the father of Reaganomics. I didn't know that, either. So we will call him pop. [Laughter.]

Mr. **Miller**. He is a very important figure.

Senator **Eagleton**. Here is what this man says.

> Reagan thinks it is impossible to persuade Congress that expenditures must be reduced unless one creates deficits so large that absolutely everyone becomes convinced that no more money can be spent. Thus, he hoped * * *

Friedrich talking,

> * * * thus he hoped to persuade Congress of the necessity of spending reductions by means of intense deficits.

That is a pretty sinister charge. It has also been made by Senator Monyihan based on a little conversation he had with David Stockman; that is, that some of these deficits were absolutely designed and structured to occur; that there was a sense of political deliberateness insofar as that process was concerned.

Would you totally refute what this Nobel Prize winner, father of Reaganomics said?

Mr. **Miller**. Well, he is simply characterizing what he believes he has observed——

Senator **Eagleton**. That is right.

Mr. **Miller** [continuing.] As for imputing motives to behavior. I cannot absolutely refute that analysis, because I was not in the minds of the decisionmakers on this.

Senator **Eagleton**. But you can't refute it?

Mr. **Miller**. Well, neither can anyone else who was not in the minds of the people who made the recommendations.

Senator **Eagleton**. You were at OMB, as Senator Roth mentioned.

Mr. **Miller**. That's right, but I was not involved in the budget formulation. But again, the actual deficits are a reflection of interaction between the President and the legislature.

Senator **Eagleton**. OK. What do you think of greenmail and poison pills?

Mr. **Miller**. Well, I think that they are reflections of an underlying problem in the commercial market for capital assets.

The problem is that very well-meaning laws and regulations have been passed making it difficult for certain takeovers to take place in the economy, including those which would lead to greater competition and lead to lower prices for consumers.

Some of them appear to give too much protection to incumbent management to engage in greenmail or poison pills to protect themselves.

Senator **Eagleton**. I asked if you liked poison pills and pay offs in greenmail.

Mr. **Miller**. That's right. So I am concerned that while both of these things are the kinds of activities that are distasteful in some way, I think they are more a reflection of problems of fine-tuning.

Senator **Eagleton**. What would you do about it? Would you write laws outlawing poison pills and greenmail, or would you have the FTC issue rules pertaining to greenmail and poison pills? Would you have the Fed issue rules pertaining to use of margin in some of these acquisition cases, the curious ways they use margin to acquire companies. In one pending before the Fed now, Revlon has been attempting a takeover by Lazy Larry or somebody.

Mr. **Miller**. Really, none of the above. I think the appropriate procedure would be to examine the regulations themselves that give this asymmetry to the bargaining process and give incumbent managers an opportunity to protect their own turf.

Senator **Eagleton**. So you would just leave it the way it is?

Mr. **Miller**. No, no, I would propose that we modify the regulations, removing this asymmetry to make it more difficult to use these defensive tactics.

Senator **Eagleton**. You are the first spokesman for the administration that has taken that position. You better get in sync with your crew. Your crew says, let the free market decide; have at it, greenmail, poison pills, whatever it is; go at it. So I am delighted we have got somebody that is on our side.

Mr. **Miller**. Senator, I don't think I am contradicting what I have testified to before or what other members of the administration have testified to on this matter.

When I say make changes in the regulations, I am talking about reducing the present regulatory impediments to takeovers in those instances where the effects would be positive and thereby, in other words, remove, in certain instances, the regulatory crutch that incumbent managers use to protect themselves by paying out greenmail or by taking poison pills.

Senator **Eagleton**. Not by either, say, law or regulation by the proper agency, eliminate or outlaw the use of poison pills and greenmail?

Mr. **Miller**. Well, what you would do, if you followed my advice, is make them no longer relevant. You would make them no longer efficient, effective ways of dealing with the problem. So you would essentially outlaw them.

Senator **Eagleton**. My time is up.

Chairman **Roth**. Senator Durenberger.

OPENING STATEMENT OF SENATOR DURENBERGER

Senator **Durenberger**. Mr. Chairman, if I may take a couple of minutes for an abbreviated opening statement, since I was chairing an Intelligence Committee meeting. I was reflecting upon the differences between 1981—when David Stockman was sitting out there—and now, there seems to be a lot of proof around that that the world is very different. And it is hard to figure out what the Director of OMB really is.

I think that is what I hear as I listen to everybody on that side of the table asking questions: We really are struggling with the identity of this job. I have been thinking, also, about all of the budget

Directors I could remember other than Dave Stockman and Bert Lance. I can't remember any of them. So I asked my staff, and they said, "Well, you would be surprised. Their names all began with Jim." Jim Lynn, Jim McIntyre, and now you.

I think what we would like to explore with you is how you view the Director's job today. Do you regard it as it was originally created, or do you see it as it is currently delimited, with all this power that seems to go with it?

I think the original concept of the OMB Director, maybe even when Bert Lance was around, was as a kind of coordinator of the President's budget; a gatekeeper guarding against excessive agency budget requests. The Director also had some broad management responsibilities, which he either used or didn't use, depending on what he brought to the task.

But today, the power, or at least the perception of power, seems to be so much larger. It seems to me—and you can tell me if I miss something—that OMB has control over agency personnel ceilings; it directs the budget process; it clears all the executive branch agency proposed rules and regulations and paperwork requests.

Mr. MILLER. Well, the personnel ceilings are a product of the legislative process, too. The President proposes and the Congress has to dispose, along with the President's concurrence.

Senator DURENBERGER. But the net effect of all of this is that there is a lot of control of the executive branch?

Mr. MILLER. Yes.

Senator DURENBERGER. I think that is what I would like to ask you at the conclusion of my statement—what you feel is important for the OMB Director to control in the executive branch. I heard you say that your job is to implement the President's policy.

But according to the Constitution, I understood the President is supposed to propose a set of policy frameworks. He then gets the Congress involved in actually legislating this policy; then it gets implemented.

However, some of us in Congress have problems when once we respond to this process, the President says cut spending, cut taxes. We cut spending; we cut taxes. The President says deregulate, and so we do some deregulating. The President says, no new programs. We haven't started new programs since Carl and I came to the Senate in 1978, that I can recall.

We respond in this process, but it seems that while we are doing so, and the agencies are implementing our new responses, there is still an effort on the part of the President to use OMB to take policy beyond our response to this political process that he has engineered.

I think that Al Gore started to discuss this with respect to the OIRA process. That is one example.

My concerns come from the realization that the budget director wields a lot of power running the budget, as well as attending to all the additional responsibilities that position entails.

You know, as we do, that we don't make policy anymore, outside the budget process. Maybe we made a little in Superfund today, but most policy for the last 4 or 5 years has been made in reconciliation. Consider social security policy. Some of us were contemplating taking off the budget. But my staff said: If you care about your kids, leave it on there. If you really want to do something about social security, you had better do it in the context of this budget process, since social security is $7 trillion unfunded. Even though it is running a current surplus of about $40 billion, keep it part of the budget process.

Because, my staff said, that is the only place we are going to be doing policy in the future, in the budget. I said, well, that is true; it is one of the places The other place we are going to make policy is through OIRA and the regulatory process.

You ran that job; you were the first Reagan appointee to run it. When you ran it, it made sense. I thought that it was a loss to the process to have you leave that job and go to the FTC. Now you are sort of back in control of it, and I suspect both the Senator from Tennessee and I are interested in what you are going to do with it from here on out. I am particularly interested in it because I am the chairman of the subcommittee of jurisdiction.

I care a lot about how we use the regulatory process. I have to say I am very bothered that since you left, it has been used in the larger sense, to fulfill the President's policies to deregulate, that is not to regulate.

There are many of us here—Carl Levin is one, I know, and there are others—who believe in regulatory reform. But we get frustrated by the lack of cooperation, inside OIRA and other places, with efforts to reform the process.

I also agree with your marketplace philosophy, with the exception of first-class postal service. I'll be darned if I know how anybody can figure out how turning that over to the private sector and keeping it affordable is ever going to work. With that exception, I like your notion of economic deregulation, the marketplace at work, using consumer choice.

But I really do need to know how you intend to reorient this OIRA process; how you intend to see that we in Congress are cut in, somehow, on the rulemaking process.

Are you going to consider that we and the public ought to get cut in on this process as early as OMB now does. When you appoint the next OIRA Director, are you going to consider quite carefully that it be somebody who would handle the job the way you did? Or are you going to look for someone who would handle it differently? For example, something appeared in the Post yesterday about the maximum contaminant level of toxic substances in public drinking water.

I showed you the correspondence. On about April 9, we sent them in, 169 days later. According to Cass Peterson, nothing has been heard, so the Senate is on the floor putting that into a piece of legislation, and "ain't that a shame."

But the greater shame is that we are reaching to be included in policy making. There is new policy being created here. We all would like to find a better way to do things, less expensive, more efficient. But we never seem to get cut in on it, we just get shifted all the time.

In the process of our getting shifted, the public gets stiffed. Therefore, would you use those 40 RMCL's under the Safe Drinking Water Act as an example, and tell me how things are going to be different.

[Prepared statement of Senator Durenberger follows:]

PREPARED STATEMENT OF SENATOR DURENBERGER

Jim, your nomination to replace Dave Stockman gave me the opportunity to reflect on the position you are applying for. Who is the OMB Director? What is his or her role? And what should I be looking for in the person who is applying for the job? It's something I'm sure you have thought about. I'd like to use my time this morning to give you my thoughts on this and to ask a few questions about your views.

The most striking thing is how different the job is now from what it was five short years ago.

The difference cannot be measured in degrees. The changes are too radical. It seems to me its a different job altogether.

Let me give you an example to make the point. I'm willing to bet that few people in this room can remember who was the Budget Director before Burt Lance: It was Jim Lynn. Or after Burt Lance: It was Jim McIyntyre. I doubt, however, that in five years or even ten, any of us will have forgotten the name Dave Stockman.

The reason is not that these men were undistinguished in the performance of their duties. It is because the job they did wasn't the kind that got them on the front page of the Washington Post day after day. When the position was created—and until very recently—the OMB Director was to serve as the coordinator for the President's budget, the gatekeeper against excessive agency budget requests, and he has also was given some broad management responsibilities with respect to the executive branch.

Today, the OMB Director has accumulated power far beyond what any of us would have imagined. OMB clears agency legislative proposals. OMB has control over agency personnel ceilings. OMB directs the budget process. OMB clears all executive branch agency proposed rules, regulations and paperwork requests. Personnel, legislation, regulation, information, money. These are the tools by which public policy is made and implemented. And, OMB has a big say in all of them.

The last two are worth considering in more detail because they represent a great change from just a few years ago.

Before Congress passed the Budget Act of 1974, the budget process was a reflection of policy decisions. It was the vehicle of incremental change—small additions or subtractions from agency appropriations to reflect Congressional satisfaction or dissatisfaction with the way agencies were doing their jobs. The Omnibus Reconciliation Act of 1981 changed all that. Today the budget process is not a reflection of public policy decisions, it's about the only way we make policy anymore. Now we write law when we enact budgets. Not incrementally, but all at once and with long term consequences. Whole programs are created or zeroed out as the result of the reconciliation process.

Before OIRA, the OMB Director was part of the audience in the congressional budget process. To be sure, he was on tap, but he was not on top. Now the OMB Director is up on the stage itself. He is a central player—keeper of the numbers, carrier of the President's message on Capital Hill, policymaker in his own right. Because this role is so different from what it was, I as a Senator feel the need to know how you as an applicant for the job of OMB Director view a broad range of public policies.

I need to know these things, unless you intend to handle the job in a substantially different way than what we have come to expect from the OMB Director in the past five years. I'd like to hear from you on that and I'd like to ask you some more specific questions later.

The second difference worth considering in some detail is the fact that the OMB Director is now a regulatory as well as budgetary policymaker. While every President since Ford has made an effort to improve presidential oversight of agency rulemaking, this Administration has taken the unprecedented step of centralizing the clearance process in OMB in the Office of Information and Regulatory Affairs.

In fact, as we all know, this role is a familiar one to you Jim. You were the first Director of OIRA in this Administration, and you played an important role in setting up the clearance process. From where I sit, OMB's loss was the FTC's gain. You did good work while you were there. You and I share a common belief that competion is good for what ails us in the marketplace. I's like to complement you on your efforts to move in that direction at the FTC. And I think I speak for a lot of us here when I say that it will be good to have you back over at OMB.

Recently, the responsibility for oversight of the OMB regulatory review and planning process has come to the me as Chairman of the Subcommittee on Intergovernmental Relations. I take these new responsibilities quite seriously. Looking back over the four years you have been gone from OMB I have been disturbed by OIRA's failure in some cases to cooperate with those of us in the Congress are also interesting in promoting regulatory reform.

I think some of that problem comes from OIRA's overly narrow interpretation of what regulatory reform means. Almost from the beginning, OIRA made it clear that the process would be used to the maximum extent possible under law to make agency regulatory activities conform to Administration regulatory policy. And what is that policy? As a practical matter the policy has been to promote less regulation. First to bring the regulatory juggernaut to a halt, then to turn the regulators around and march them back down the hill. In some cases—such as trucking and airlines—that is the right thing to do. In others—such as social regulatory programs—it may not be.

I am the first to applaud OMB for taking up the challenge of regulatory reform. At its best, OMB review should be a process to improve the implementation of regulatory statutes—to be sure they are efficient, effective and consistent with Congressional intent. It is the President's responsibility to take care that the laws are faithfully executed.

But I am concerned that OMB has not always been at its best. This is especially so in the case of environmental regulation. Here economic efficiency was never our prime objective. Rather, we regulate to safeguard the resources we have for the generations that will follow. The message here—for OMB and for Congress—is not for government to get out of the market place. It is for government to get in and regulate in a rational way. One that recognizes the limits of local capacity to pay, and of industry to respond.

The overly narrow definition of regulatory reform has sometimes led OIRA on a counterproductive crusade against particular environmental, consumer, and civil rights regulations—which in the long run pushes Congress to legislate more prescriptively than it should. All of that takes us further from, not closer to our goal more rational regulatory policies. So, at its worst, the OMB review process has been used as a short cut to regulatory reform which in the end may turn out to be just a detour.

I'd like to hear from you on your view of the OIRA process—what it is supposed to do and how you intend to handle the growing perception that the process has been used more to make law than to see that it is executed in the most efficient and effective way. And I have a few more specific questions to ask about it. Thank you.

Mr. **MILLER**. Senator, thank you for your statement, nearly all of which I agree with completely.

Let me also apologize to Senator Gore. I didn't mean to take up so much of his question time in reading that.

Senator **DURENBERGER**. The red light was on.

Senator **GORE**. You didn't start reading until after my time was up.

Senator **DURENBERGER**. Don't apologize to him on my time. [Laughter.]

Go ahead.

Mr. **MILLER**. I think there are two things we need to keep in mind about this. No. 1, I don't think there is anything to hide in the OIRA process. Public inspection, congressional inspection of the process, I think, is very good. We should let the sun shine in.

Therefore, I am much more inclined toward, as Senator Gore suggested, logging contacts with outside people or whatever. I am not reluctant to have that kind of open process.

On the other hand, there is the business of discussion among members of the administration, of the President's appointees, involving the deliberative process. And, the deliberative process goes down the ranks into the civil servants. You know the deliberative process people engage in, even in an adversarial relationship, for the purpose of generating truth and generating ideas.

If they know that everything that they say has to be subjected to inspection, they will pull their punches. So I think it important that these communications are allowed. This does not involve substance that is not in the record, because the substance, the facts or basis for decision, has to be put in the record. That was started when I was there.

I think there needs to be some protection of that information. I know that this committee marked up legislation that would have required OIRA to make public all the written communications between it and the agency after the final promulgation of the rule, and I don't have any problem with that. I support that legislation.

But, on the other hand, I am troubled by opening the process so that everything that one agency person says to another is open to public inspection, and where you draw the line. I mean, do you draw the line at where they talk at cocktail parties, or when they run into a Senator at a cocktail party and they say, "I am interested in this rule"?

Senator **Durenberger**. Have you had a chance to talk about Joe Wright yet, about the safe drinking water RNC proposal?

Mr. **Miller**. No, I have not talked with him about that.

Senator **Durenberger**. Do you have a view on it?

Mr. **Miller**. I do not know. From what you have told me, I think there should have been more expeditious treatment of the proposal.

Senator **Durenberger**. Are you going to stick with the 60 days, which are in the law, from now on?

Mr. **Miller**. If it is a matter of requirement, of course, I will observe whatever is in the law.

Senator **Durenberger**. I wonder if you might agree now that——

Senator **Gore**. It is in the Executive order, not the law.

Senator **Durenberger**. It is in the Executive order. That goes to the Constitution.

Mr. **Miller**. The Executive order has certain timeframes that essentially say if the agency submits something to OIRA, to the Director, and no word is heard, it is deemed that it has met with complete approval.

My recollection is that while I was there, the average turnaround period was 9 days, so I would hope that we could——

Senator **Durenberger**. Terrific.

Mr. **Miller**. We could have a quick turnaround.

Senator **Durenberger**. I wonder if I could ask you to agree that sometime before the end of this half of the session—perhaps before we go out for Thanksgiving—you will come up and personally testify? I assume you are going to be confirmed very shortly. Could you come up after you have taken over—say, within the next couple of months—and present testimony before our subcommittee on this whole issue of OIRA; how you view this process at work; the issues that are raised by the oversight of the regulatory process?

Mr. **Miller**. Right. I would be glad to.

Senator **Durenberger**. Let me ask you a question that deals with budgets. Unlike my colleague from Tennessee, I don't even talk to economists any more.

Mr. **Miller**. You would sleep better at night, probably.

Senator **Durenberger**. Yes, and like my colleague from Missouri and my colleague from New York, I have been trying to sort out the various economic theories and find out why we have a perennial deficit. I am coming dangerously close to endorsing the Eagleton-Moynihan theory that there is some deliberate effort here on the part of the President and this administration to use deficits for two reasons: One, to bleed every ounce of inefficiency out of the current Federal effort to respond to national problems. Some of that is to bleed out the direct appropriations; get rid of programs; cut back the money; cut back the regulations.

Other means accomplish this indirectly; get rid of the tax subsidies and that sort of thing. Just cut out a national role and use the pressure of the deficit and the uncertainty of the economy and the uncertainty for the shoe workers and the farmers and the machine tool workers and all the other people in this country who are going out of their professions.

They are being lost; to use that pressure to get us to denationalize the financing of public services.

I mean, somebody says, acid rain. You say, we can't afford it. Somebody says, preventive health care. You say, we can't afford it.

Whatever it is that some of us—Republicans and Democrats—may believe is a national responsibility, well, the answer to the public is, "We can't afford it." So Mr. Stockman characterized my response to the national acid rain thing as $6,000 per fish. That is a typical way to say to the public, "We ain't got the money to do that kind of good," or "this crazy Senator from Minnesota had the wrong way of going about it."

I wonder if you wouldn't reflect for all of us on what you consider to be the purpose of the budget in this kind of a policy making context? To what degree is this budget process designed to bleed out the nationalization of responses to national problems and to prevent us from getting into acid rain and Superfunds and toxic wastes and health prevention and that sort of thing?

Mr. **Miller**. Again, I can't speak for the decisionmakers of the past. I was not in their minds, and I don't mean to imply that I agreed with the hypothetical characterization that you put forward as possibly existing. I just don't know, and so I can't refute it. I would be surprised if that were the case.

Let me say that I think, quite aside from the deficit, the Government should be managed well; should be managed efficiently. I think that the taxpayers deserve to have programs that make sense, and for the legislature and the President to eliminate programs that don't make sense. I think it is important that taxpayers can rely on all elected officials to be parsimonious with the expenditure of these billions of dollars in resources that we make decisions about every day.

But times changed. I do not believe that all of the appropriate roles of the Federal Government have been fully exhausted. There may be opportunities and needs for the Federal Government to fill in the future, and conditions change.

So I do not have a knee-jerk reaction against any spending programs or any program simply because it spends money. I would want to evaluate the merits of the program, and I say to you that is the way I would look at it.

Senator **Durenberger**. There is another way to find out whether the President wants to balance the budget other than the constitutional amendment. That is, to require that when the President submits his budget each year, he also submit a balanced budget.

We have had that in the past, and Jimmy Carter did it a couple of years. But some of us added another requirement, which just hasn't gotten off the ground because the administration wouldn't support it. That is, you would be required to submit with your regular budget, unbalanced as it is, a balanced budget and the regulation necessary to effect a balanced budget.

Concomitant to that, the Congress could not pass a budget resolution that is unbalanced unless it, too, had passed a balanced budget period. Not the legislation to go with it.

What is your view on putting that sort of system in effect? That could be done legislatively. We don't have to wait for the States to endorse it.

Mr. MILLER. Let me say, Senator, I think we are into sufficiently desperate straits in terms of the size of the budget deficit today, desperate meaning that it is sufficiently large that solving it overnight would be a mistake. That is, to balance the budget next year would mean some precipitous action that I think would have long-term costs to the economy and to those who depend on the largess of the Federal Government.

So I think that phasing out the budget deficits over a period of several years is the way to go. But once that were accomplished, I think a proposal such as that makes some sense. It is a variant on the kind of constitutional amendment that the President has proposed and we discussed briefly in my colloquy with Senator Eagleton.

Senator DURENBERGER. Thank you.

Chairman ROTH. Let me advise you, Mr. Miller, as well as the others here, that after discussion with Senator Eagleton, it is my intent to continue through the lunch period. We will be happy to recess for a few minutes at your convenience.

But in order to expedite the hearing, we plan to move forward. Would you care for a recess at this time?

Mr. MILLER. At your convenience, sir, I would appreciate just a couple of minutes.

Chairman ROTH. The committee will be in recess.

[Short recess.]

Chairman ROTH. The committee will be in order. Senator Stevens is not here, so Senator Levin is next on the list.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Mr. Chairman, first, let me welcome Mr. Miller. I have a couple of questions on the budget deficit, and then I also want to get into the regulatory areas which have been introduced by Senators Gore, Durenberger, and perhaps others this morning.

First, on the budget deficit issue, I happen to agree that the budget deficit is not only the enemy of taxpayers, but it is the enemy of good programs. We have been dismantling good programs, not just bad programs, because of this budget deficit, and the deficit, then, becomes a threat to the well-being of this country fiscally and also to important programs.

I was glad to hear your description of it as a critical problem.

I understand two things from what you said this morning. You said two things which give me a little heart in terms of your willingness to look at ways of reducing that budget deficit. One, you said that you would not put anything out of bounds in your consideration of how to reduce that deficit; and two, you said you are willing to look at the whole budget, to use your words.

Can I assume from those words that when you say you are not putting anything out of bounds—that you are willing to look at the whole budget—that you are also willing to look at defense cuts?

Mr. MILLER. Yes.

Senator LEVIN. You are also willing to look at the COLA issue?

Mr. MILLER. Yes, sir.

Senator LEVIN. Delays, freezes?

Mr. MILLER. Yes.

Senator LEVIN. You are also willing to look at revenues, how to increase revenues?

Mr. MILLER. Yes.

Senator LEVIN. Does the President know all this?

Mr. MILLER. I think so.

Senator LEVIN. It is a very different position from what we get from this administration that says: No cuts in defense, no impacts on COLA's, and no revenues. That is what we get from this administration. The Budget Director is telling us he is willing to look at defense, he is willing to look at COLA's, he is willing to look at revenue.

Mr. MILLER. Right.

Senator LEVIN. I am glad to hear it, let me tell you. I think that particularly, putting revenues off the table has been a mistake, when he says he will veto even a tobacco tax extension. I think the public would get up and cheer if we extended the tobacco tax.

But the President says, "Make my day, send me a tax bill." Well, the extension of the tobacco tax, if we have to vote for that to keep it in place, is a tax bill. Apparently, some of us are willing to make his day, at least, by keeping that tobacco tax.

I am delighted to hear that you are willing to look at all aspects of the budget that you are not baked into any particular decision, and that, apparently, you have the freedom to make the recommendations along the line that you have indicated, which is that you are dealing with a clean slate.

You can go in there and make whatever recommendations that you believe are in the country's best interest.

Mr. MILLER. Of course, I would just say that I will be carrying the administration's policies, and that the President will decide what the administration's policies will be. I will faithfully represent the policies of the administration.

But I thoroughly anticipate, in the process of identifying options and making recommendations to the President, that nothing is off base, that nothing is sacrosanct.

Senator LEVIN. I understand that you will obviously carry out whatever decision the President makes. The important thing here is, that you, as OMB Director, have the freedom to make recommendations in the areas that the President has put off the table.

You are saying as far as your recommendations to the President, defense is on the table, revenues are on the table, and so forth. As far as your recommendations to the President, and I have already mentioned that, that is an important bit of news as far as I am concerned and a very useful bit of news.

Mr. MILLER. Senator, following up on my answer to the questions that the committee gave me, I think I owe the President the very best call I can possibly make in making recommendations to him and developing options for him. I intend to do that.

Senator LEVIN. Good; I think you not only owe it to the President; I think we all owe it to the country.

Now on the regulatory area, I think you are well aware of a number of amendments that have been approved by this committee, indeed by the Senate, with which I have been involved.

First was one that Senator Rudman cosponsored with me in 1982. It was an OMB disclosure provision which gets right to the heart of the issue as to whether or not OMB's role in this regulatory process is going to be disclosed or whether it is going to be hidden.

That amendment required a number of important things: One is that there be a disclosure of the drafts of the proposed and final rules that came in to OMB; second, that written comments back and forth between the agency and OMB be disclosed; and third, that the agency make a written explanation of the reasons for any significant changes made by the agency in the drafts of the proposed or final rule which respond to any comment from OMB received by the agency.

That was adopted by the Senate, I believe, by a vote of 94 to nothing. We worked very hard to craft that amendment.

Mr. MILLER. Yes.

Senator LEVIN. Do you support that amendment? I know that we intend to reintroduce that in the form of a bill, because we have been frustrated by the amendment process, getting this thing adopted into law. Do you support that amendment?

Mr. MILLER. I do.

Senator LEVIN. Similarly, we offered an amendment to the Paperwork Reduction Act, which did not pass the Senate for other reasons. I think you are familiar with the terms of the Paperwork Reduction Act amendment relative to disclosure and do you support that amendment?

Mr. MILLER. I do.

Senator LEVIN. Now, relative to the implementation of the Executive order we have been talking about this morning, the Justice Department has filed a brief. I think you read from a portion of one brief relative to the way in which Executive Order 12291 operates.

I would like to read to you from a portion of another brief that the Justice Department has written on the OMB's behalf in the case of *Environmental Defense Fund* v. *Thomas*.

The Justice Department wrote that an agency head is legally free to ignore the Executive order's directive and exercise his discretion to promulgate a regulation without subjecting it to OMB review. Do you agree with that?

Mr. MILLER. Yes.

Senator LEVIN. Do you think that the agency heads, in fact, feel free to ignore the Executive order's directive?

Mr. **Miller**. Well, no more than they would feel free to ignore any other procedural requirement laid down by the President. They do so with peril.

Senator **Levin**. So they are legally free to ignore it, but they don't, as a practical matter, feel free, nor should they?

Mr. **Miller**. Well——

Senator **Levin**. Is that what you are saying?

Mr. **Miller**. Let me draw the analogy, Senator. I am legally free, or any executive branch—let me put my situation at the FTC aside. But the executive branch employee who is a political appointee with Senate confirmation presumably is on the President's team, that is, is responsive to the Chief Executive, and would want to do what the Chief Executive believes. He or she would want to follow the Chief Executive's guidelines in terms of policy and process.

To that extent, I think that any head of any agency would want to adhere to a program and a set of policy guidelines enunciated by the President of the United States.

Senator **Levin**. My question is somewhat different from that. My question is this representation that was made by the U.S. attorney or the Attorney General in this brief.

The brief says that an agency head is legally free to ignore the Executive order's directive. Isn't the Executive order law?

Mr. **Miller**. No.

Senator **Levin**. Executive orders are not law?

Mr. **Miller**. No. They are not.

Senator **Levin**. That is news.

Mr. **Miller**. Pardon?

Senator **Levin**. That is news to me.

Mr. **Miller**. Right.

Senator **Levin**. As far as I know, and I will check it out, they are a form of law. There are many forms of law. The Constitution is a law.

Mr. **Miller**. Yes.

Senator **Levin**. Although it is not adopted by the Congress. Obviously, congressional laws are law, and as far as I am concerned, the Executive orders have the force of law.

Mr. **Miller**. I don't think so, Senator, and surely not the same as law passed by the Congress and signed into law by the President.

Now, I would point out, if I'm not mistaken, I think both Executive Orders 12291 and 12498 say that failure to report is not judicially reviewable, although I understand that frequently provisions are put into law. As a matter of fact, the Paperwork Reduction Act Amendment, I tnink, has said failure to comply with requirements were not judicially reviewable.

Senator **Levin**. That is part of the Executive order.

Mr. **Miller**. Pardon?

Senator **Levin**. That is part of the Executive order.

Mr. **Miller**. The Executive order says those requirements are not judicially reviewable, which, I guess itself is some evidence that it is not meant to be law. The only way a law can be generated is for Congress to pass it and the President to sign it or to have a veto overidden.

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Senator Levin. Pursuing that, we have a differences of opinion, because I think Executive orders do have the weight of law. In any event, when the brief says an agency head is legally free to ignore it, that is a fairly technical statement, isn't it? Because, as a matter of fact, agency heads are not free to ignore the Executive order's directive, are they? You don't want them to have the impression that they are free to ignore that directive, do you?

Mr. Miller. Well, in the same regard that I think it important for the decisionmakers to understand that the President has asked them specifically, within the scope afforded by law, to allow their regulations to be guided by certain principles and to be involved in certain procedures, I would want them to comport with those requirements.

Senator Levin. Sure you would, sure you would.

Mr. Miller. Absolutely.

Senator Levin. OMB doesn't want agency heads to ignore the Executive order's directive. You want them to comply, don't you?

Mr. Miller. Indeed.

Senator Levin. As a matter of fact, can you name any regulation that has been promulgated over OMB's objections since this Executive order came into effect?

Mr. Miller. I don't have that information. I can't name one right now.

Senator Levin. You don't know of any offhand, do you?

Mr. Miller. There have been rules promulgated that did not incorporate OMB's suggestions, even the ethyl oxide regulation.

Senator Levin. Pardon?

Mr. Miller. Even ethyl oxide was promulgated without modifying the rule in ways that OMB suggested might be propitious.

So there have been rules that have been promulgated that did not comport completely with OMB's recommendations. But except for some accidents, I don't know of any rules that were promulgated that completely bypassed the process. I was amused——

Senator Levin. No, I don't mean bypass the process, I mean that went ahead despite OMB's objections substantively. Do you know what I mean?

Mr. Miller. I don't know of any. I know there have been situations in which OMB's objections were taken to higher authority, were discussed with the Cabinet Council or the President's Task Force on Regulatory Relief. That was one of its roles, to discuss situations where an agency head has disagreements over a proposed regulation.

Senator Levin. I understand, but in the absence of some appeal to a higher Cabinet body, somebody inside the White House, you don't know, do you, of any rule offhand that has been promulgated that substantively disagreed with the OMB directive?

Mr. Miller. I do not know, except for those that I said.

Senator Levin. This brief also says that the President has directed agencies only to respond to OMB's views, not to conform to them.

As a matter of fact, but for that appeal process, you don't know of any agency rule that has been promulgated that does not conform to the OMB statements and directives, do you?

Mr. **Miller**. As I said, I understand the ethyl oxide decision did not conform entirely to OMB's decision.

Senator **Levin**. Wasn't that the one where the agency promulgated the regulation the day before it had to be published by court order, and then the OMB actually came along and actually crossed out the words that it didn't like, and it was promulgated with the words actually blacked out?

Mr. **Miller**. I don't know. I just don't have that much familiarity with it.

Senator **Levin**. Do you want agencies to conform to OMB comments relative to their rules?

Mr. **Miller**. Yes, and if there is a difference, that it be raised and worked out some way.

Senator **Levin**. But you want them to conform?

Mr. **Miller**. Yes.

Senator **Levin**. That is the message you are trying to get to the agency, right?

Mr. **Miller**. Yes.

Senator **Levin**. You don't consider them advisory, only, these OMB comments, do you?

Mr. **Miller**. No. I would anticipate that the agency heads would respond to them.

Again, if they had a difference of opinion that they felt was sufficient, and a timeframe that was very short, they might well make a decision differently, but I would anticipate and hope that the process would work where differences would be worked out.

Senator **Levin**. I am not talking about responding to them; I am talking about complying with them.

Is that what we are talking about?

Mr. **Miller**. Right.

Senator **Levin**. As a matter of fact, there are some sanctions, aren't there, if the agency heads feel that they don't conform with those comments? Here, I am quoting your interview in a magazine called Regulation in 1981, which talks about what happens after the OMB comments are forwarded back to the agency. And you are quoted as saying, "So if you want to get ahead, you're going have to write new rules and review existing rules in conformance with the principles set forth by the President and in the Executive order." And the context of course, means as interpreted by the OMB.

Don't you feel pretty strongly that the agency heads feel that if they don't comply here that there is going to be some kind of action taken that is going to injure them? Aren't you the toughest kid on the block? Isn't that the way you have described OMB?

Mr. **Miller**. Right. Right.

Let me say, Senator, I hesitate, from past experience, I hesitate in commenting on something that I have written without looking at the context. I am not as articulate as I might be. Could you tell me from what page that quote comes?

Senator **Levin**. No.

Mr. **Miller**. Oh, I'm sorry.

Well, in general——

Senator **Levin**. It was such a famous quote I thought you would know it by heart. [Laughter.]

Mr. **Miller**. The toughest kid on the block I do recall. The other, in terms of getting ahead, I suspect what I had in mind there is that the President expected his appointees to conform with those principles he articulated in the Executive order. The Executive order says: Within the scope afforded by current law, you should base your decisions on the following kinds of principles. That is what I primarily had in mind.

Then there is a set of procedural requirements, that is, that the agencies should send the rules over for OMB to review, and perform regulatory analyses, and respond to comments from OMB, before promulgating a rule or regulation.

Senator **Levin**. My time is up. Let me summarize in the following way. Some of us have been very active in trying to build some accountability into this OMB review process. Some of us believe, basically, that the White House can't have it both ways. If it wants to centralize power in the OMB over regulations, it has got to handle that exercise of power responsibly. It has got to be accountable for it.

It can't have power centralized in terms of deciding what is in a rule but then diffuse the responsibility by having the agencies take the rap for what is in a rule.

If the OMB is going to, in effect, write these rules, OMB, as part of the White House, is going to have to take the rap for the portions that it, in effect, writes. That is what is critical here. Some of us, may I say, don't even want that centralization of power to exist. Some of us are opposed to that altogether, indeed, think it is unconstitutional.

I happen to be in a second group that think it probably is constitutional, think it probably is appropriate, providing, providing the public knows who is writing the rules. Because if the OMB is going to write the rules and have the power, in effect, to do it, but the agencies are going to get the rap for it, take the responsibility for it, there is a delinkage in the exercise of power which is not tolerable in a democracy.

So the amendments which I talked about before, which we wrote, became very critical amendments as far as the position that many of us take here. If we are going to tolerate the exercise of this kind of power by OMB, we want the exercise of that power accountable; we want OMB and the White House held responsible for decisions that the grain dust standard is going to be "this" instead of "this" and the other standards we talked about are going to be this instead of what the agencies have recommended.

You have been very helpful in your answers relative to those amendments. As I said, they will be put in a bill form by this committee. Your support of those bills, I think, will go quite far, at least in my mind, to satisfy the responsibility issue.

My red light is on, and I thank the chairman.

Chairman **Roth**. Thank you, Senator Levin.

Senator Chiles and Senator Glenn are not here.

Senator Gore?

Senator **Gore**. Thank you very much, Mr. Chairman. I appreciate that. Just following briefly on the questions just asked: as a Member of the other body, I took testimony from a gentleman named John E. Daniel, who served as the chief of staff to the former Administrator of the EPA during the last few years.

He gave this testimony in response to questions I asked about whether agency heads were really free to ignore the OMB's directives.

I asked Mr. Daniel, "In those cases in which EPA took some action contrary to the wishes of OMB, what were the consequences?"

Mr. Daniel replied, "Well, usually, there were valid threats of what would happen next. On one occasion, Mr. Gore, I was a participant with the Administrator, then Mrs. Gorsuch, in issuing some regulations over OMB's objection. These were regulations that had been ordered by court. The agency, the Administrator was under court order to issue by a certain deadline. When they had not received the requisite OMB approval under the Executive order, she nonetheless signed the regulations and issued them.

"Late that evening, I received a telephone call from an OMB official in which—" and I interjected, "Who?" He said, "Mr. Jim Tozzi, who worked with Mr. Demuth at OMB at the time."

I believe, let me interject here, that Mr. Tozzi worked at OIRA while you headed it. Daniel continued, "But he said to me words to this effect: That there was a price to pay for what we had done and that we hadn't begun to pay."

So it really is not accurate to say that they are free to ignore OMB's directives on these matters. They have to do it or else they must pay a heavy price, and OMB has the power to exact a very heavy price. Would you agree with that?

Mr. **Miller**. Well, first, I don't know the details of this episode, so I'm reluctant to comment on it specifically.

I think that it's important that agencies understand they must carry through on the requirements of the Executive order. We have seen, from time to time—and it's only human nature, I guess—agencies that have some court-imposed or legally imposed deadline to issue regulations, to wait until the very last minute. Again, I am not talking about this particular case, because I don't know what the circumstances are.

So the problem arises not so much because the agency failed to revise the regulation pursuant to the comments of OMB, but chose simply to all but ignore the Presidential Executive order.

Senator **Gore**. The record will show that there are all kinds of court orders and deadlines that have been missed because of OMB.

Now, you said in response to the prehearing questions that you believed OMB has performed admirably under Executive Order 12291, correct?

Mr. **Miller**. Yes; on the whole, from the information I have, I think that's a reasonable conclusion to draw.

Senator **Gore**. It is one that I disagree with.

Let me read to you from a letter dated June 21, 1985, written by Mr. Charles Elkins, the Acting Assistant Administrator for the Office of Air and Radiation at EPA to Mr. Robert Bedell, the Deputy Administrator at the Office of Information and Regulatory Affairs at OMB.

I think it is an extraordinary letter, and I want to quote it. This is the EPA guy writing to the OMB guy:

> Since you were out of town this week and I could not reach you by phone, I decided to send you this note on my concerns about the overdue lists of air regulations at OMB. As you can see from the attached list, the number of Office of Air and Radiation actions at OMB for review is extensive. Many of these have been there for 3 to 4 months, and some for a longer time period.
>
> The official review times for our regulations are being grossly exceeded. The problem seems to have two aspects: First, your staff reports that insufficient time and higher priorities have prevented them from initiating a review on many of these items, particularly the NSPS rules.
>
> Second, on the few items that are reviewed, additional analyses submitted in response to requests do not seem to lead quickly to decisions by your staff which we can either agree with or elevate for resolution.
>
> I have no doubt that your hard-working staff is as concerned as we are but seems spread too thin to process the growing workload. They appropriately focus on the designated priority items, but except for those with court ordered deadlines, issues are slow to surface; then are rarely resolved or elevated to decisions on any timely basis, and only then after constant badgering from my staff.
>
> Many of the MSPS rules remain unreviewed, even though it is likely few significant issues will surface. In short, we have a management problem which is getting out of hand.

That doesn't sound to me like a system that is performing admirably, Dr. Miller. Does it to you?

Mr. **MILLER**. Well, let me say that I would surely look into the details of that when and if I am confirmed and remedy the problem. The problem may be that OIRA needs additional resources. I wouldn't hesitate to ask for them if that were the case. It may be that priorities were simply established wrongly, and I would look into that, as well.

But keep in mind that the major reason for the issuance of the Executive order was that there was a public perception, which I think was true, that regulation had gotten out of hand. It was uncoordinated, and it was imposing very substantial costs on the economy in many areas, which were in excess of the benefits. It was restraining the ability of U.S. manufacturers to compete with manufacturers abroad. Something had to be done.

President Ford had issued an Executive order on regulation. President Carter had issued another Executive order. Basically, what was needed was to put teeth in the order to have more requirements than simply have the agency head solicit information on an ad hoc basis about major rules and regulations.

That was the reason for the establishment of the Executive order. That's the reason that President Reagan carried out his campaign promise to do better to coordinate regulation and reduce the excessive burden of regulation. He made very clear to all of us that his appointees were to achieve the legitimate goals of regulation, but to do it at lower cost. That was the reason for the Executive order and, in fact, for regulatory relief. Relieving the economy of the excessive cost of regulations, those that are not justified, was one of the cornerstones of his domestic recovery program.

Senator **GORE**. I strongly support the goal of regulatory reform. I don't think that Executive Order 12291 has accomplished regulatory reform.

I think it has thrown a series of monkey wrenches into the process and has set up a back-door channel for people to stay off the record and get information not considered by the agencies, in order to try to get a result that has not been arrived at, according to the procedural safeguards that the Congress writes into these laws.

I also think that there is a basic design problem in this system that you were the architect of, back in 1981.

For example, just building on this one particular case here, I started to say isolated. It is not at all. It is just an example that can be found all over the place.

This office has only three desk officers for EPA. Last year, EPA submitted almost 300 regulations. How do you expect to manage all of those regulations with just three people?

Mr. **Miller**. Well, again, it may be that we need a forth or a fifth. I do not know of the workload. I simply have not been there, and I just cannot say; I cannot answer that question.

But, you can ask the same question anywhere: How can one single EPA Administrator make a decision on 300 different regulations? Well, of course, you become acquainted with the scope of these regulations and many of the aspects of them, and so you can process them fairly quickly.

Senator **Gore**. Well, the answer is because he or she has an enormous staff to back them up and to prepare this. These people are just sort of pretending to be experts about the subjects that they are reviewing, and they have the power but not the staff and not the expertise.

So the natural human result is just to put it in the back and put it off and there it waits and waits and waits and waits; and even in cases where there are court orders, even in cases where there are statutory deadlines, they still just leave them there and wait.

I have a list [1] that I will supply for the record of all the regulations that have been held up past statutory deadlines that were developed under certain environmental statutes. In case after case, the rules were held up at OMB, even though a congressionally or a court-mandated deadline has passed. It is almost a routine matter by now.

Even though the EPA bears some responsibility when they turn in their proposals to you after a deadline, I don't understand what your legal authority is to hold up a regulation after a statutory deadline has passed. Could you explain that to me?

Mr. **Miller**. Let me say first, Senator, having been a civil servant—an analyst—I am very concerned that a statement that particular individuals have no expertise or are incapable analysts go without challenge. The people, at least those who were there when I was there, had a great deal of expertise, and were devoted public servants, and worked very, very hard and very, very long hours. So I think it would be best not to take issue with them or talk about them in a pejorative tone.

Senator **Gore**. Are any of the three desk officers reviewing these Clean Air Act regulations—do any of them have scientific backgrounds?

Mr. **Miller**. I simply do not know at this point what their qualifications are.

Senator **Gore**. Do you want to guess?

Mr. **Miller**. They are very expert in the field of regulation and the issues before them. In the same way, the enormous staff of

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[1] See p. 241.

EPA would have analysts sit down and evaluate the record. I believe that the system may well have some imperfections, and from time to time, there will be excessive demands or other problems.

The desk officers do draw on the expertise of the budget officers, as well.

Senator **Gore**. Let me say for the record that I think it will show that one of those three actually does have a bachelor of science degree in biology, not that that is the be all and the end all, but my point is they don't have the staff and expertise.

I wanted to get back to the question that I just asked. If a statutory deadline has passed, what is your legal authority at OMB to say to the agency, "Don't worry about that statutory deadline. We will not let you issue this regulation?" What is your legal authority to do that?

Mr. **Miller**. Well, Senator, the first amendment says that anybody can say anything they want. If that is legal——

Senator **Gore**. No, the first amendment doesn't quite say that. The first amendment doesn't authorize you to yell "fire" in a crowded theater or to illegally direct a result if it is contrary to law.

But other than the first amendment, what is your legal authority to order an agency to forget about a statutory deadline and just run past it?

Mr. **Miller**. I have not done that, and I haven't researched the legal authority.

Senator **Gore**. Do you think there is any such legal authority, as you characterize it?

Mr. **Miller**. Again, the Executive order is not law. It is hardly any different from——

Senator **Gore**. We have been through that. You tell them, if you don't do what I say, there is a price to pay, and you also say that there has never been an example of——

Mr. **Miller**. Not to my knowledge.

Senator **Gore** [continuing]. That you are aware of, but as a practical matter, the agencies have to do what you tell them to do.

My question is, What legal authority can you cite for telling them to just go past the deadline, even though it is a statutorily mandated deadline?

Mr. **Miller**. Quite aside from OMB, it does, it happens not infrequently that agencies, agency heads have essentially ignored statutory deadlines. They do it to their peril because of a court-mandated deadline. There may be serious repercussions from that.

But maybe I might put it in the context of a hypothetical. Suppose that the head of agency Y felt that it was under statutory deadline to issue a regulation by next Tuesday, and when Tuesday rolled around, the head of this agency found that the regulation made absolutely no sense at all. And suppose that one of the close advisers said: You know, you would be better off, better served, you would better serve the American public by, in a sense, ignoring the statutory deadline, not issuing the regulation, but issuing it in an improved form as soon as possible. That is, that you would do more damage, you would do more damage to the intent of the law by precipitiously issuing this regulation that has been so poorly drafted than to hold it up and do it better.

Now, the kind of counseling given by this adviser is, to my mind, no different legally than the counsel that the OMB might give an agency head on the same matter about holding it up.

Senator Gore. Mr. Chairman, I would ask unanimous consent to include the Daniel testimony that I referred to earlier in my questions in the record.[1]

My time has expired. If we have another round, which I hope we will, I will pursue it further.

Senator Stevens [presiding]. Senator Chiles.

OPENING STATEMENT OF SENATOR CHILES

Senator Chiles. Thank you, Mr. Chairman.

Mr. Miller, I congratulate you on your appointment. You have been before the Senate for confirmation before. It is not a new process to you. I am going to put my opening statement in the record.

I do want to use your confirmation process to make a point about the Office of Federal Procurement Policy. I sponsored the law creating the Office in 1974. It, at that time, was the No. 1 recommendation of a blue ribbon procurement commission upon which I served. Senator Roth was a key cosponsor of that law. In 1983, as a result of Senator Cohen's leadership and Senator Levin's support, the Office was strengthened. President Reagan signed that reauthorization bill.

As you know, the Administrator is to be confirmed by the Senate. Since his resignation some 8 months ago, the President has not nominated anyone. Here is an agent within OMB with strong statutory authorities who could be used to encourage more competition in Government contracting; could be used to get a handle on Government contract scandals; or could be used to end the regulatory overkill Government imposes on business, and the position goes vacant.

Nobody cares. Whether we sponsor contracting policies which enable agencies to treat their suppliers as partners in a cozy relationship with the Government or whether we sponsor a competitive supply base where sound business practices prevail is a fundamental issue in reforming the Federal Government spending practices.

Sole source contracting puts the Government in a position of worrying about stockholders' profits. We need to turn the system more toward competitive practices.

How can this administration be serious about reducing the price of toilet seats and $400 hammers if we refuse to use a tool that Republicans and Democrats alike have agreed to support?

I read your answer to the to the preconfirmation question that you will work for the appointment as soon as possible and that you will also support the administration-sponsored legislation to merge the Office of Federal Procurement Policy into OMB.

Can we talk in a minute about that legislation? Deputy Joe Wright promised Senator Cohen's subcommittee that proposal during a hearing on Grace Commission recommendations last January. It was to come up with the management report. I have not seen it; my staff hasn't seen it, and I am not sure whether Senator Cohen has seen it.

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[1] See p. 272.

I am also familiar with the so-called arguments that the Office of Federal Procurement Policy is independent and not a part of the OMB team. The same folks that created the Office of Information and Regulatory Affairs created the Office of Federal Procurement Policy. I am confident you felt a part of the team when you headed the paperwork shop.

The key, it seems to me, is whether the Director gets his own person and believes in the mission. If the Director wants the rest of OMB to get along with their colleagues in the Office of Federal Procurement Policy, I am sure it will happen.

What I propose to do is to write a letter to the President and invite my colleagues to sign it and ask by what date Congress could reasonably expect a nominee. I personally would hope that we would get an answer to that letter before we move your confirmation process. It seems like to me, the President ought to give us a date, and somehow, we need to get the White House's attention.

I wonder if it isn't fair for us to ask some kind of assurance by what date a nominee will be up here and find out if the White House is interested in that, too. I think there are billions of dollars to be saved with proper leadership. The continued neglect of this is just not responsible.

[Senator Chiles' prepared statement follows:]

PREPARED STATEMENT OF SENATOR CHILES

Mr. Miller, I too want to welcome you to this committee on this occasion. Congratulations on your appointment.

You have appeared before this committee before as the head of the paperwork shop. You were also confirmed by the full Senate as the Chairman of the Federal Trade Commission. I guess it is fair to say we know a little bit about your professional credentials.

You have been in several Government agencies over the past decade. You know how Government works. In some circles that might not help you much—but I don't anticipate much of a challenge to your professional credentials today. But I do want to ask you about your perspectives on the job.

I am one of those who believes the Federal deficit should be this country's number one priority. Not everyone agrees. And I am one who thinks the country is facing a genuinely historic challenge. If confirmed, you are going to be one who is going to have something to do with future directions—you are going to be a part of whether anything gets done in the near future.

As a member of this committee, the Budget Committee, and the Appropriations Committee, I suspect we are going to repeatedly revisit this issue of what the number one priority should be.

Whether it is a defense build-up, no tax increases, cutting domestic spending, or reducing the Federal defecit, today is a chance to let us know where you are coming from before you take office.

Let me add it concerns me tremendously that not enough is being done to communicate to the American people that all those priorities can not be met at the same time. Choices have to be made.

Secondly, I want to ask your views on the Director of OMB's management role.

Since I came to the Senate in 1970, I and several other members—particularly in this committee—have spent a lot of time asking where's the "M" in OMB?

The history of this committee's interest in the Director's office during the past fifteen years has been to strengthen the Director's hand in carrying out the President's management responsibilities, and to enhance accountability to the Congress.

We have taken steps on both fronts. First, there was the 1970 reorganization plan number 2 under President Nixon, which renamed the bureau of budget and added the term "management".

Then came 1974, the post-Watergate era. We required future appointments to the Director and Deputy Director positions receive advice and consent from the Senate. Up to that time, the President was left to his own means to select a Director.

We passed the Congressional Budget and Impoundment Control Act. That law restructured the budget process, created the Congressional Budget Office, and gave expanded duties to OMB.

We also created the Office of Federal Procurement Policy within the Office of Management and Budget. Similar to the Deputy Director, Senate confirmation was required of the head of OFPP.

In 1979 and 1984, and over the objections of the Defense Department, Congress reauthorized that Office. It is intended as a policy shop for Government contracting issues, a policy arena that now amounts to over 170 billion dollars a year.

In 1980 we passed the Paperwork Reduction Act, which among other things assigned the Director responsibility in statistical policy, telecommunications, automatic data processing, records management, and regulatory management.

This record establishes clearly the importance Congress attaches to the Director's role.

Looking back over that history I am reminded of a quote from the very first Budget Director at the first meeting of agency heads two days before the 1921 Budget and Accounting Act took effect.

He commented that "The Budget Bureau must be impartial, impersonal, and nonpolitical."

That statement found its way into BOB Circular Number 1 and was intended to be the order of the day.

That time has passed.

I am also reminded of former Director Roy Ash's observation in the early 1970's—some fifty years later—that the only power the Director of OMB has is that given to him by the President.

That time too has passed.

I doubt many Congressmen perceive the director's job in either of those extreme terms. But I hope you do not look at this list of laws, all of which came out of this committee, and view the Congress as merely trying to keep you from doing your job.

Whether it is the budget deficit or managing the executive branch, the important problems require leadership from both branches of Government. That is my point.

I also hope you don't chose to ignore Congress or the responsibilities assigned to you under those laws. The Congress has the power and responsibility to hold your Office accountable.

Ultimately, what we created, we can abolish or change.

Mr. MILLER. Senator, let me say that I fully anticipate, should I be confirmed, to invigorate OFPP and to make it part of OMB. I want the Director of OFPP to be as integrated a part of OMB as any other component of OMB, and I want OFPP to do its work. I think you are right that there are opportunities for substantially improving our procurement process to lower the costs to taxpayers of securing the services required by Government.

So I would move forward on that quickly. I have to be candid with you, and say that it is difficult to say, I think, that by October 28, just to pick a date out of the air, the President will appoint someone. It depends on what the supply of appropriate, qualified people for that post would be.

I am not yet at OMB, and I haven't recruited anybody. It would look a bit presumptuous for me if I tried to recruit somebody during the past several weeks prior to a confirmation hearing. There are a number of suggestions that have been made to me.

However, it is a Presidential appointment, not the OMB Director's appointment. I would anticipate having strong input into that process, and I would be surprised, frankly, if the President were not to take my advice on who would be most appropriate for that post.

You realize, of course, too, that it is a Presidential appointment requiring Senate confirmation, and there is a process that is followed including background checks, FBI checks, financial disclosures and so on.

Senator CHILES. You have got to have a nominee before you start any of that.

Mr. MILLER. But typically, the White House does, for reasons that we know too well from experience, some background checks and FBI checks before the nomination is even forwarded to Congress.

The process does take time, and those safeguards are for reasons that there are no need for us to go into, but are well known. I promise you this, Senator. OFPP will be a high priority for me. Obtaining the right person for the job, recruiting that person and recommending that person to the President of the United States, will be a high priority for me.

I would anticipate encouraging the process of background checks, et cetera, to go as expeditiously as possible so that the nomination can reach the Senate as soon as it possibly can. I can't promise a specific date, because the process, as you know, is a bit uncertain as to how long these background checks and the selection process takes. I think it would be unreasonable to ask for a specific date. You might get a letter back from the President saying: "I would anticipate nominating the person by the end of November or the middle of November," or something like that. But that, too, would be subject to a great deal of uncertainty.

I think the real question here is, without meaning to put too much importance on my own role, is what role I am going to play. I am telling you that the selection of a person to be head of OFPP is going to be a high priority of mine, and you have my word on that.

Senator CHILES. What does the public protection provision of the Paperwork Act mean to you? What is the Director of the OMB's responsibility if a bootleg paperwork requirement, one which does not display a control number, is brought to his attention by someone out there in the public?

Mr. MILLER. You are supposed to suppress the activities that go along with the paperwork requirement until the agency comports with the process required by the Paperwork Act.

Until then, according to law, my understanding is that someone who is required to do something subsequent to any activity under the Paperwork Reduction Act has no lawful obligation to respond. Beyond that, if anyone brought to my attention, as head of OMB, that there were paperwork requirements being imposed that were not authorized pursuant to the requirements of the Paperwork Reduction Act, I would seek to suppress that activity. If it were a worthwhile activity, I would have it go through the right process.

Senator CHILES. Mr. Chairman, I have some other questions, but I am going to submit them for the record.

Senator STEVENS. Thank you.

Mr. Miller, one of the comments we have here today from witnesses to come says it is going to be Miller time at the OMB now.[1] [Laughter.]

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[1] See article on p. 302.

It may be time to get to some of those questions about Miller time. For instance, I note that you have personally taken the position that the Private Express Statutes ought to be repealed, and as Director of OMB, do you think that is your mission, to pursue that personal point of view?

What is going to be your position as the head of OMB with regard to the Private Express Statutes?

Mr. MILLER. Senator, I still think it is a good idea, but I doubt that it will be very high on my list of priorities. The budget, and the set of other issues that we have discussed here—regulations, OFPP, et cetera—those things will be much higher priorities for me.

Senator STEVENS. I recall in the past where I participated in several confirmation hearings and I thought that such an answer would be sufficient. Now I am a little wiser, I think, maybe a little more cautious.

Are you going to pursue the repeal of the Private Express Statutes, or aren't you?

Mr. MILLER. Well, I just can't rule it out as a possibility. It would depend on the amount of time I had. If it was something that was——

Senator STEVENS. Do you think that is your function as the head of OMB, or is it a matter that should come from the Postal Service or from some other source?

Mr. MILLER. Oh, I think the head of OMB has license to make recommendations to the President for legislation covering a broad variety of things. Anything that he or she thought would improve the delivery of Government services should be included on a list of things to consider. Again, repeal of the Private Express statutes would be something that only Congress could do. The administration could not do it alone.

I wouldn't promise you that the matter would never cross my mind, and I am not going to say that I would never raise it with anyone there. But, it's not a high priority item for me.

Senator STEVENS. Let's go back to your whole idea about repealing them, then. You are not a lawyer, and I have read your comments about that. Being a lawyer, I respect you for the fact that you stayed with economics instead of going into the law, but you are familiar, I take it, with the constitutional provision with regard to Congress having the duty to provide post offices and post roads.

Mr. MILLER. If I'm not mistaken, article 1 of the Constitution enables Congress to establish post offices and post roads.

Senator STEVENS. Right. So then it would seem to be Congress' prerogative to deal with that question, don't you think?

Mr. MILLER. The Congress has the prerogative to deal with that question, as any other——

Senator STEVENS. Can you tell us what your rationale is? What is the reason that you believe the Private Express Statutes should be abolished?

Mr. MILLER. I think the evidence is rather substantial that where competition has been allowed in the delivery of packages, parcels and anything resembling first-class mail, the market has worked very, very well. It has lowered costs and given better service.

If you——

Senator **Stevens**. Do you know any competition that exists between Chatanika and Chalkyitsik? You probably don't even know where they are.

Mr. **Miller**. No.

Senator **Stevens**. The Postal Service and the Private Express Statutes weren't just designed for New York City to Philadelphia.

Mr. **Miller**. We could go into a long colloquy concerning this. Let me suggest that one reason there isn't a service like that is that the Postal Service has a monopoly. When someone has a monopoly, it means you can't enter. We have had numerous cases of people trying to enter the business of delivery of first-class mail. They have been unsuccessful, since they have been put out of business by the Department of Justice.

Senator **Stevens**. One of the express groups that wants to move parcels overnight came into Alaska, and they decided to provide service only in Anchorage. They never went to Kodiak or Chalkyitsik or Chatanika or Nome or Wainwright.

As a matter of fact, they didn't go to similar places in the rural areas of the south 48.

They were not denied access into there, but they never attempted delivery because they felt that they could not provide that service. The question really comes down to whether or not you believe that the Federal Government has any business at all like that in the Postal Service. If you want to do away with the private express statutes, I assume that you believe ultimately we could relieve ourselves of the responsibility of even having anything to do with the Postal Service.

Mr. **Miller**. Again, the statute says the Postal Service has a monopoly; no one can get into the business of delivering first-class mail. If there were a demand for service between isolated geographical areas that was not provided by a competitive service, then that service might—it sounds like heresy—but it might well be subsidized by the Federal Government directly, just as our program of small communities' air services was provided.

As I said, in the article that appeared—it was based on testimony, by the way—I gave to the Senate 3 years ago in good faith. The evidence from airline service, for example, suggests that the cost of providing those kinds of subsidized service is far smaller than the cost that you may be experiencing because of a Postal Service that is not as efficient as it might be if it did not have the monopoly.

Senator **Stevens**. But just to those who represent those areas, Mr. Miller. Remember the commitments were made at the time of deregulation to provide essential air service to the areas of the country which would not be served otherwise by commercial service not subject to regulation.

Yet this year, we will see now, finally, the total demise of the support of essential air services. And the genesis of that demise was the Office of Management and Budget. OMB convinceed the President that we should no longer provide that service, yet had we not been seduced into believing it, we would have opposed deregulation of the air carriers. I am sure you realize that.

What you are really suggesting is that eventually we could get into a position where we could do away with the private express statutes on the basis that perhaps Congress would go back and subsidize mail between Chalkyitsik and Chatanika to Holikachuk or something like that, or South Podunk to Podunk.

But as a practical matter, once we take that route, we go out on a limb, and someone from OMB will provide us a saw. I am a little bit disturbed that the Office of Management and Budget will have a head who may embark on a career to repeal the private express statutes. There are lots of things out there to do, but if we are going to have that fight, then I want to know it now, and I want to start my fight with you when I still have a fairly equal balance. [Laughter.]

Can you tell me your intentions? Do you know?

Mr. MILLER. Let me say the Airline Deregulation Act of 1978 envisioned a 10-year program of service to small communities. I don't know. I simply don't know what is in the budget today, but that program was to end unless Congress——

Senator STEVENS. It is to terminate this year. What we are looking at now is a a total demise of essential air service.

Mr. MILLER. I think perhaps what would be in the budget is the demise of the subsidy for essential air service. Air service may well——

Senator STEVENS. By definition that is what it was; essential air service was that area that had to be subsidized.

Mr. MILLER. Let me say, too, that I did not propose eliminating the Postal Service. I simply suggested allowing competition. There is an argument concerning whether a cross subsidy is needed, and people have different opinions on that. There are various studies that have shown that there are no really substantial scale economies.

One proposal that I made in a colloquy with Senator Symms, when I testified before him 3 years ago, was that you allow competition to begin in isolated areas. If, indeed, those are the ones that you think might be jeopardized by competition with the Postal Service, allow competition to take place there as a beginning. That would be a simple test.

As far as my interest in this issue, if I open the book and look down the list of things that would concern me as Director of OMB, the Postal Service private express statutes would be pretty far down the list. I am not going to promise anyone, Senator, that I am not going to think of things like that, or that I might not share views. But, I do not anticipate making it my career, at OMB, to secure the elimination of the private express statutes. That would be a terrible misallocation of my time. I would be derelict in my duty, because I will have far more important things to do than to address the issue of the Postal Service.

But I am not going to say simply that under no circumstances will I even think of it.

Senator STEVENS. I think you have the background to be an excellent head of OMB. As a matter of fact, you have a better background than anyone I have seen, including your immediate predecessor, other than Elmer Staats when he was there. He had a very distinguished record. You have, too.

But there is a lot of Presidential power in that office, and I am trying to get a grasp of what you intend to do with it.

For instance I, over the weekend, read your papers on economics. I found them very interesting, particularly the heavy emphasis on your real—I believe it would be not improper to say—desire to see the basic tenets of Adam Smith return to our economy. That is, I think, reflected in the private express statutes concept; isn't it really?

Mr. MILLER. Yes; I think that's correct.

Senator STEVENS. That is really the question we have to decide, whether we want Adam Smith back in OMB. [Laughter.]

Miller time sounds a lot better. [Laughter.]

What about your position on the draft? I read those articles, too, and you were very much in favor of the draft, and now you are getting into the OMB at a time when defense support is waning; when many of us see the increases in the cost of manpower as perhaps coming to the point where it will be an impediment to the completion of our modernization program. Even though I was one of the original sponsors of the bill to do away with the draft with my good friend, the Senator from Arizona, it appears that perhaps we will have to rethink that.

Now, in view of the articles that I read, are you prepared to rethink the draft?

Mr. MILLER. I would have to see rather convincing evidence that would persuade me to believe that a draft would be superior to a volunteer army. I am firmly——

Senator STEVENS. I am not talking about whether it is superior. I am talking about whether we can afford it. From a cost point of view, as I gather, right now, we have had military wage increases since 1970 of 214 percent, and we will have another 5 percent this next month. We have had Federal civilian wage increases of 130.5 percent.

We are getting to the point now where the wage increases are impinging upon our modernization program. While I really have a deep feeling about the draft, I think it is time for us now to ask ourselves as a nation whether it is not less expensive for our young people to contribute to their country when they can afford it, when they are young, as opposed to paying extremely high taxes to support the Department of Defense as they grow older.

I think it is time for us, economically, to review the whole question of the draft.

Are you prepared to do that?

Mr. MILLER. Senator, I think we ought to contemplate the rather significant restraints on individual freedom I believe are constituted by the draft only under extraordinary circumstances.

Second, as to the question of cost, I think it has been documented in researches far beyond my own that what a draft accomplishes is merely shifting the burden of the cost from the taxpayer, in general, onto those that are drafted. For reasons that would take some time to elaborate, the real cost of the draft is lowest when there is a volunteer army.

There is a question of the rents earned—what economists call rents—at a time of massive buildup. Those young people who do go into the service who have low opportunity costs get very, very good deals, and there are some equity concerns there.

But barring a substantial buildup of forces, I believe, at least from the evidence that I have seen, that it makes far more sense to retain a volunteer army. Again, that is more consistent with our notions of freedom for the individual than is a draft.

Senator **Stevens**. I don't disagree with that necessarily, but I also believe that we have a basic responsibility to provide for the common defense, but when we get to the point where it cannot be afforded without the draft, we have a duty to reexamine the draft.

Let me ask you one last question about that, and that is the overall question of the defense budget itself. We are now entering a period of declining support for the defense establishment, and in all the papers I read and everything I have seen that you have written, I find nothing about the Department of Defense.

Have you ever written anything or made any statements about defense or support of the defense establishment?

Mr. **Miller**. Except for my work on the military draft, I may have had a book review or two about matters involving defense. For example, I remember reviewing Clarence Danhoff's book, "Government Contracting and Technological Change," for the Southern Economic Association years and years ago. That book dealt with some of these issues. Also, I reviewed a National Bureau of Economic Research volume on military contracting.

But other than that, I don't think I have specifically written about defense matters.

Senator **Stevens**. Just to alleviate any question later that we would ask you, do you have any problems with the President's program with regard to the Department of Defense?

Mr. **Miller**. No, not at all. I think it is very important for us to maintain a very strong national defense. Defense is, as Adam Smith himself pointed out, one of the most important responsibilities of any government. So I am committed to that.

But referring back to the question raised by Senator Levin, if there are ways for accomplishing that level of preparedness and strength at lower cost, I want to ferret those out, as well.

Senator **Stevens**. Being chairman of the Defense Appropriations Subcommittee, I see 65 percent of the reductions, the so-called savings in the budget process this year, coming from 27 percent of the budget. I am delighted to hear that you are supported by the President in the program.

Let me read to you a statement from Senator Mark Andrews, who has asked me to inform you that he is in North Dakota. This is his statement.

> It is a predominantly rural area comprised of many small businessmen and farmers who rely heavily on the U.S. Postal Service. However, I think that you will find that many of us who serve in the U.S. Senate represent groups of individuals who will be severely harmed if your proposal to eliminate Private Express Statutes is effectuated.
>
> In the spring/summer edition of The CATO Journal you argue that fears of the cost of mail delivery in rural areas rising are exaggerated and cite airline and trucking deregulation as examples of businesses maintaining service to small communities in a deregulated environment. I am somewhat puzzled by your comparison of costs versus availability of these services. Are you aware that it costs more to fly from Washington, DC to Fargo, ND than it does to fly from Washington, DC to Los Angeles?

Mr. **Miller**. I am not surprised to hear that.

Senator **Stevens**. Senator Andrews would like to know how individuals in out-of-the-way rural areas and those living in economically undesirable locations would be served under the proposal and if private enterprise refuses to deliver to unprofitable locations, do you believe that the U.S. Postal Service should assume that unprofitable task?

Mr. **Miller**. I think the public at large might well assume that task. Again, to the degree that that service is now provided where competitive firms would not provide it, it means that somebody else is paying the freight. Rather than having that task be distributed to the people who use first class mail, or wherever that subsidy is coming from, I think it would be more equitable and more sensible to have that subsidy out on the table and in the budget itself.

There is no such thing as a free lunch. If competition would improve the efficiency of the Postal Service, then that simply reveals that the costs that we now impose on mailers to provide the current subsidy are excessive.

So for that reason, I favor competition. But, again, the proposal that I suggested to Senator Symms, as I recollect, would provide a test where no one could be hurt. It would allow competition in those out-of-the-way places as a market test to see if the prediction that the post office monopoly must be retained in order to provide service to low-density areas is, in fact, valid.

Senator **Stevens**. By the way, is your family here?

Mr. **Miller**. Yes.

Senator **Stevens**. If you have not yet had an opportunity to introduce them, we would be happy for you to do so.

Mr. **Miller**. Chairman Roth did introduce them.

Senator **Stevens**. Good.

Mr. **Miller**. I am very proud to have them here. Yes.

Senator **Stevens**. Well, I hope you will be able to take them to lunch soon.

Senator **Eagleton**. Now that you are finished?

Senator **Stevens**. Now that I am finished.

Senator **Eagleton**. Mr. Chairman, Senator Glenn was here earlier. He asked and thus I ask you unanimous consent that his statement be printed in the appropriate portion of the record.

Senator **Stevens**. Without objection.

[Prepared statement of Senator Glenn follows:]

Opening Statement of Senator Glenn

Mr. Chairman, we are here today to consider the nomination of James C. Miller III, for the position of Director of the Office of Management and Budget (OMB).

I consider this post to be one of the most important and influential in our entire governmental structure. The Director of OMB, through Presidential authority, is responsible for preparing the President's budget, advising the President on legislation passed by Congress, and conducting economic forecasting. Because of these significant functions, OMB has been a powerful institution since its creation in 1970.

The past four years, however, have witnessed an unprecedented expansion of OMB's role. This office now serves as the executive branch's legislative and regulatory gatekeeper, performs detailed policy analysis, reviews agency testimony before it is given, plus, most significantly, screens agency proposals and rulemaking. I think that part of this aggregation of authority stems from the nature of the institution itself, and part of it is attributable to the personality and character of Mr. Miller's predecessor, David A. Stockman.

Mr. Miller appears to be well-qualified to assume this vital position. His academic background is impressive. He also possesses substantial governmental and public policy experience. There is no question in my mind that he has the necessary capabilities required to be an effective OMB Director. Although I expect we will disagree from time to time over the efficacy of particular budgetary proposals or general economic policies, I know that Mr. Miller's decisions will reflect careful deliberation.

What does concern me, however, are Mr. Miller's ideas on so-called regulatory reform. As head of the OMB Office of Information and Regulatory Affairs during the Reagan Administration's transition period, and also as Executive Director of Vice President Bush's Task Force on Regulatory Relief, Mr. Miller played a crucial role in the formulation of Executive Order 12291. The intent of this Order was to improve the accountability and efficiency of executive agencies' informal rulemaking procedures by requiring that proposed "major" rules be subject to cost-benefit analysis. Thus, to the extent permitted by law, agency regulatory action cannot be undertaken unless the potential benefits to society substantially outweigh potential costs.

This order was a striking departure from prior efforts to control the rulemaking process because, for the first time, it established a centralized mechanism for presidential management of agency rulemaking functions with substantial authority for active intervention into and direction of the process at all stages. Hence, under this Order, the Director of OMB, as the President's designee, has authority over the definition, implementation, and enforcement of the Order's provisions, reviews all required cost-benefit statements, and can prevent an agency from publishing its proposed and final rules.

This aggregation of power to effectuate Administration policy through screening final agency rules, sometimes at the expense of Congressionally-mandated intent, is cause for concern. There have been numerous examples of disputes between Congressional Committees and the OMB over this issue. Most significant is the fact that these conflicts have revolved around OMB's power to revise or withhold agency regulations pertaining to public health, safety, and the environment.

To eliminate truly duplicative and unnecessary burdens on business and industry is one thing and I support that. But to pursue regulatory reform subjectively based on ideology is quite another. To measure quantitatively the value and benefits of an agency rule designed to protect public health and safety near, say, a high-level nuclear waste repository, requires that a value be placed on a human life. There is no objective measure in this case. The debate boils down to who determines what the "public interest" is.

It is my understanding that five House Committee Chairmen have joined a lawsuit over occupational health rules charging that this Executive Order has resulted in OMB "unlawfully interfering" with agency rulemaking and that OMB is engaging in "systematic usurpation of legislative power". I believe this reflects the seriousness of Congressional concern over this Executive Order and its potential for violating the separation of powers between Congress and the Executive Branch.

I am also concerned about the future intentions of the Administration on this issue. I must first note that Congress refused to formalize OMB's final rule review procedures when the House failed to act on regulatory reform legislation in 1982. Moreover, the legislation submitted by the Reagan Administration originally gave OMB review authority over independent agencies. I was able to get an amendment included in the Senate's regulatory reform bill which specifically exempted independent agencies from the binding effect of OMB's review procedures, thereby preserving their independence.

Perhaps in light of these two actions it comes as no surprise that the Reagan Administration recently launched another assault on agency rulemaking processes. Under Executive Order 12498, agencies each year are required to establish a regulatory agenda subject to OMB review. This plan must detail every agency regulatory activity "planned or underway", including the "development of documents that may influence, anticipate, or could lead to the commencement of rulemaking proceedings at a later date". Additionally, these annual agency submissions must "explain how they are consistent with the Administration's regulatory principles". If OMB decides that a proposed action is not consistent with those principles, such action may not be pursued by an agency. Any action not included in this report must be specifically approved by OMB. Thus, an agency may not engage in a regulatory activity not approved by OMB unless it is so required by Congress or court order.

I should mention that the first Regulatory Program report required by this Order was just released in August. It is significant to note that almost two-thirds of the over 550 major regulatory actions listed involved the departments of Health and Human Services, Labor, Transportation, and the Enviromental Protection Agency.

These agencies, of course, have major responsibilities for ensuring public and occupational health and safety.

What is of interest to me is the fact that we may never know what was left out of the regulatory agenda, because it was not consistent with the President's program. There is grave danger that this preliminary review process could be used only for political objectives. No checks or balances are provided for in this new Order. Accountability to Congress and the public has been ignored.

In closing, Mr. Chairman, the post of OMB Director is not easy to fill. It demands a person well versed in economic realities as well as in economic theories. It calls for one familiar not only with managerial and organizational models, but also administrative practicalities. And finally, it is a post which demands scrupulous adherence to the principles of honesty and integrity.

I think James Miller satisfies these conditions, but I again reiterate my serious concerns over the direction of regulatory review procedures at OMB. I look forward to hearing Mr. Miller's testimony and to the Committee proceedings on his nomination.

Senator EAGLETON. Mr. Miller, some day you will leave Government, perhaps, for example, at the end of this Reagan administration. Perhaps you may enter the free enterprise system. I posit this to you as a followup to Senator Stevens' question and tie into your days at the FTC and your definition of deception, what is deception. We will get into that further a little later on.

Suppose, as you leave the administration, you and some investors form a free enterprise corporation called the Adam Smith-Jim Miller Postal Service and you state that you are going to offer postal service from Chalkyitsik to Cucamonga, and in the ad, you say, "Join us, make millions. Free enterprise reigns. The Adam Smith-Jim Miller Co. will make you a fortune."

Is that a deceptive ad?

Mr. MILLER. Not if I said it, Senator.

Senator EAGLETON. The truth is, it is more than just the color of the names, Chalkyitsik. The truth, as Senator Stevens points out, is that not everything goes from New York to Philadelphia.

Mr. MILLER. Right.

Senator EAGLETON. There are tens of thousands of communities that are not New Yorks and Philadelphias. They must be served. I agree on the constitutional point that they should be served.

One other peripheral matter before we get into some substantive areas. You were involved in the ketchup war, were you not?

Mr. MILLER. Actually, Senator, I got a bum rap. I received a bum rap on that.

Senator EAGLETON. Let me read this. Then you can clarify that. This is a very recent UPI article, United Press International article dated September 3, 1985. Just for background purposes, at one time, the administration declared ketchup to be a vegetable on one of their cost-cutting binges, and they were after food stamps and other nutrition programs and school lunches and what-have-you. They moved ketchup into a vegetable, and that is great. That was great from the administration's view.

This was said:

> The Food and Nutrition Service of the Agriculture Department wrote this ketchup rule, but United Press International has learned that Miller, in his job at OMB, Information and Regulatory Affairs Office, gave his personal approval to the proposed school lunch regulations.

Then it quotes this fellow Hoagland. He was the Administrator of the Food and Nutrition Service, William Hoagland. "On the basis of that—" referring to Miller's review, "—we went ahead."

Now, what is the truth of this? I ask unanimous consent that the article be printed at this point in the record.

Senator **Stevens**. Without objection.

[The article referred to follows:]

[From the Globe, September 23, 1985]

BUDGET DIRECTOR NOMINEE ONCE APPROVED KETCHUP AS VEGETABLE

WASHINGTON.—James C. Miller III, President Reagan's nominee for budget director, approved a 1981 administration cost-cutting plan to count ketchup as a vegetable in school lunches, documents obtained by UPI show.

Miller, currently head of the Federal Trade Commission, was chief of the regulation department at the Office of Management and Budget in 1981.

The proposed school lunch rules, which were withdrawn because of strong opposition, would have allowed the nutritional value of condiments such as pickle relish and ketchup to be counted in fulfilling the requirements of a government-subsidized school lunch.

The Food and Nutrition Service of the Agriculture Department wrote the proposed rule. But United Press International has learned that Miller, in his job as OMB's Administrator for Information and Regulatory Affairs, gave his personal approval to the proposed school lunch regulations.

"On the basis of that, we went ahead," said William Hoagland, who was administrator of the Food and Nutrition Service at the time.

Miller, who faces confirmation hearings at the Senate Governmental Affairs Committee Tuesday, refused to comment on this or any other issue.

"He's not doing any interviews until after the confirmation hearings," said FTC spokeswoman Judy Pond. Asked specifically about the school lunch regulations, Miss Pond said, "He won't talk about that."

However, a Miller aide confirmed Sunday that Miller received notice of the proposed school lunch regulations but said Miller's acknowledgment of the notice was misinterpreted by the Agriculture Department as permission to go ahead.

"They mistook that for a sign-off," said the aide, who requested anonymity. "Jim did not intend to be signing off on it."

Nancy Amedei, former head of the Food Research and Action Center, which helped make "Ketchup as a Vegetable" the rallying cry of those who thought the budget cuts proposed by Reagan in 1981 were too drastic, was somewhat sympathetic to Miller in a recent interview.

While saying it made the government look like "Laurel and Hardy," Miss Amedei noted that someone "reading through (the document quickly) would not have known. It was hard to understand the impact that it would have."

Miller is expected to win approval easily from the Republican-led Senate, although he may be questioned closely about his previous tenure at OMB and FTC.

The power of the budget director has grown dramatically in recent years, especially during the nearly five years it was held by David Stockman, who helped Reagan deliver on campaign promises by engineering deep budget cuts in 1981. Stockman resigned his post this summer.

Mr. **Miller**. Mr. Chairman, the truth is that I received and acknowledged receipt of the proposed regulation, which dealt with classifying various foods and meeting nutrition standards. However, I received the proposed regulation the day it was printed in the Federal Register. I acknowledged receipt of the proposed regulation with a notation, "Many thanks".

I always respond to correspondence in one way or another. Ninety-five times out of 100, I respond to the correspondence by just putting a little note on it. It was essentially a cover sheet, but stating that they had to go forward and publish it without the ordinary OMB review process.

So, I could hardly have approved the regulation by having acknowledged receipt of it the day it, in fact, appeared in the Federal Register. The allegation that I was the Federal official that approved what became known as the "ketchup as a vegetable" rule is simply not true.

Senator **Eagleton**. All right.

Mr. **Miller**. I will be glad to supply a copy of that for the record.

[The information referred to follows:]

United States
Department of
Agriculture

Food and
Nutrition
Service

Washington,
D.C. 20250

September 1, 1981

Mr. James C. Miller III
Executive Director
Presidential Task Force
on Regulatory Relief
Office of Management and Budget
Room 246 - OEOB
Washington, D.C. 20500

Dear Mr. Miller:

This is in compliance with your letter of May 22 to the General Counsel, Department of Agriculture requesting prior notification when major regulations are to be published.

Publication of two regulations is scheduled for September 4.

1. "Meal Pattern Requirements" (CFR Parts 210, 220, 226)
2. Food Stamp Program: Household Composition, Income Standards, Initial Month Benefits, Adjustments, Deductions and Outreach (7 CFR Parts 271, 272, 273 and 274)

Attached are advance press releases summarizing the new regulations.

G. WILLIAM HOAGLAND
Administrator

9/4/81

Many thanks.

Senator **Eagleton**. If you wish to supply additional materials for the record on that point, we would be glad to get it.

Now, let's move on to the very important area of affirmative action. This administration is in the middle of rewriting Executive Order 11246. That Executive order is 20 years old. It was issued by President Johnson in 1965. It requires Federal contractors to comply with affirmative action and in so doing, keep statistical information on their employment practices.

The revision of that order, the 20-year-old order, has been spearheaded by the Justice Department and OMB. It stipulates this revision: "That a Government contractor would no longer be required to use numerical goals or keep statistical measures."

Frankly, this strips the order of all meaning. The measure of compliance will merely be "the number of persons who are recruited to apply" and thus the Reagan administration will be telling employers, "Interview lots of different people, but we don't care who you finally pick."

And by the way, the old Johnson order we used to refer to says nothing about quotas and, in fact, expressly forbids the use of such rigid tools.

What are you going to do about this new draft order? It is in the mill.

Mr. **Miller**. I have not been involved in it. I do not know the details. I tell you my own personal views are that to hire anyone on the basis of race, creed, or color is wrong, just as it is to discriminate against someone for hiring on the basis of race, creed, or color.

I do believe in what I call at the Commission affirmative recruitment, which we do because it is the moral and just thing to do. And, it is the right thing to do from an efficiency standpoint, as well. We need to search out those people that have been denied opportunities, that have been discriminated against, and give them the chance to get that foot on the ladder, to go up that ladder. Those people make the best employees, and that's the policy that I have carried out at the Federal Trade Commission.

Senator **Eagleton**. How many employees have you got at the FTC?

Mr. **Miller**. Roughly 1,200.

Senator **Eagleton**. 1,200, roughly? How many are black?

Mr. **Miller**. I do not recall the precise figures. Over a third.

Senator **Eagleton**. Do you have the figures?

Mr. **Miller**. I will be glad to supply them to you for the record.

Senator **Eagleton**. For these purposes today, over a third you think are blacks, or 400 plus are blacks, you think?

Mr. **Miller**. Yes, sir, I think so.

Senator **Eagleton**. How many are women?

Mr. **Miller**. About the same. No, something more, approximating half.

Senator **Eagleton**. Half are women?

Mr. **Miller**. Yes.

Senator **Eagleton**. Does that include many black women and many Hispanic minority women?

Mr. **Miller**. Sure.

Senator **Eagleton**. How many are Hispanic?

Mr. **Miller**. I can't remember the exact figures; maybe 5 percent.

Senator **Eagleton**. Five percent are Spanish, so that might be 70 of 60 or so. Can we have later for the record the exact breakdown?

Mr. **Miller**. I will be glad to supply the information.

Senator **Eagleton**. See, that makes my point. We can then supervise, we, the Congress, what you are doing or what you are not doing with respect to affirmative action in your agency, because we can get the numbers. Not that you have them here with you, but you will supply them to us.

What this Executive order purports to do is to deny that authority to appropriate agencies with respect to people contracting with the Federal Government, because they are going to do away with the statistics.

We can say, "Well, look. Why do you only have 60 Hispanics or so, roughly 5 percent? The Hispanic populations in this country is considerably higher than that."

We could inquire.

Or, "Why do you have so few blacks at a high pay level? You have got a lot at a low pay level, but why do you have so few at a high pay level," if we probe into that, and that proves to be the case.

I am making no charges here. I am just using it for illustrative purposes. But if this Executive order goes into effect, this modification of a 20-year-old Lyndon Johnson order, then we have no mechanism, neither Congress, EEOC, the Labor Department, any Federal agency, the press, interested citizens, there is no way to monitor affirmative action, if we don't have the numbers.

Your numbers exist. In fact, your job in large measure, is going to be numbers, policy and numbers. Why would we have an Executive order that wouldn't give us the numbers?

Mr. **Miller**. Senator, let me say that I categorically state without equivocation, no one, as far as anything I have to do with it, will be discriminated against on the basis of race, creed or color in the Federal Government. I think that also should apply to those from whom we obtain resources for the Government.

The question there would arise, "What is the best way to get such information?" I don't have easy answers. I would be more than happy to look at that.

Senator **Eagleton**. I wish you would. This is a very important area.

I presume, Mr. Chairman, the record is going to be kept open for a period of time for additions for the record and if there are questions to the witness submitted in writing.[1]

I wish you would focus on this. I would like to have you here in person when this one was broached to you, that you will take a look at that proposed order. It is in the mill. Based on your own experience in operating the FTC for 3 or 4 years, whatever it is you have been down there, juxtapose that experience with affirmative action, hiring policies, with what will result from an Executive order that strips out the statistical gathering.

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[1] For additional relevant material see p. 298 and p. 300

Give us a further comment on it in writing.

Mr. MILLER. Senator, I am reluctant to commit to that, because I am not sure that I would be able to acquire the requisite information about that Executive order—whether I would even have access to what the proposed modifications would be.

Senator EAGLETON. That is not good enough, Mr. Miller. We are not talking national security, the CIA, the FBI. We are not talking war and peace. We are talking a very basic constitutional fundamental.

Senator Stevens talked about article 1 of the Constitution. We are really talking the 14th amendment, the Equal Protection Clause of the Constitution.

There is no reason for secrecy or denial of access or limitations of access when we are talking in this area. That would not be satisfactory to me. I will seek to withhold any markup on this nomination if your answer continues to be that you wish to stand mute on this issue.

Mr. MILLER. Senator, we are not disagreeing over the 14th amendment to the Constitution, let the record show. I think I have indicated very clearly my commitment to the goals of equal opportunity for all Americans, both for those hired by the Government and those hired by suppliers to the Government.

The question, as I understand it, which you wanted me to address is how I would modify this Executive order or whether I would modify it at all. My suggestion is that it is something that is very complicated and would take time and resources to address. I'm not sure whether it is something on which the administration would claim Executive privilege. I'm not sure, given my position as a nominee, that they would necessarily want to share the necessary information with me. If they will, I will be glad to review it.

But keep this in mind: I don't think it reasonable for me to come forward with a proposed Executive order, a proposed revision. I would be happy to give you my comments about it, but I think that it is a matter that merits more consideration than just a yes or no answer as to whether it should be changed.

Senator EAGLETON. This Executive order was, in part, generated by OMB, the position about which you are before us for confirmation, along with the Justice Department.

It is not in final form; it is working its way through the process. It is still potentially within your command. It is still potentially within your command if you were to be confirmed, and the hope is you would be confirmed in an expeditious way. Therefore, this committee has not obviously the right but the responsibility to know what your thinking is about this order. You administered a very important department of Government with 1,200 employees.

We want the benefit of your comments in depth on this order as to how this order can be enforced in the marketplace out there. We don't have any way of gathering the basic statistics that are necessary for an affirmative action inquiry.

It isn't as complicated, Mr. Miller, as you are making it out to be. That is the question that we are posing to you.

It may be a shade embarrassing to you.

Mr. MILLER. Why would it be embarrassing to me?

Senator **Eagleton**. Because you as a forthright man, and I mean that, and you as a person of good conscience, and I mean that, may find that this proposed modification in a 20-year-old civil rights Executive order is for the birds. You may want to tell us that. We would like to hear what your comments are.

So I am going to strongly urge that you give us the benefit of your comments on this Executive order, proposed executive order as it is going through.

[Mr. Miller's response follows:]

FEDERAL TRADE COMMISSION
WASHINGTON, D C 20580

OFFICE OF
THE CHAIRMAN

September 25, 1985

The Honorable Thomas F. Eagleton
Room 111
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Eagleton:

This is in response to the question you raised yesterday at my confirmation hearing regarding my views on a draft Presidential executive order* that would amend Executive Order 11246, issued by President Johnson on September 24, 1965. Specifically, you asked whether the draft executive order would prevent the Secretary of Labor from requiring that firms contracting with the Federal Government provide certain statistical information concerning their employment practices.

First, Senator, I'd like to emphasize my own views as articulated in our colloquy yesterday. Under no circumstances will I tolerate employment discrimination on the basis of race, color, religion, sex, or national origin. And while I take issue with the view that the goal of equal employment opportunity can best be accomplished through such means as hiring quotas, goals, and timetables, I am firmly convinced that a program of affirmative recruitment and training -- one that gives opportunities to minorities and others who in the past may have been victims of discrimination -- is not only a moral imperative but is a means of acquiring more effective personnel. On a related point, please find attached the statistical information you requested about employment here at the Federal Trade Commission.

On the basis of a review of Executive Order 11246 and the draft executive order that would amend it, I conclude that nothing in the proposed executive order would, in fact, preclude the Secretary of Labor from collecting statistics on recruiting, hiring, and/or training practices of government contractors. Instead, it would appear that the major thrusts of the draft executive order are (a) to clarify that Executive Order 11246 is not meant to constitute a legal basis for a showing that failure of a government contractor to adopt or attain certain statistical measures is prima facie evidence of a law violation, and (b) to direct the Secretary of Labor to revoke all rules and guidelines promulgated on the basis of Executive Order 11246 which are inconsistent with (a) above.

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* Reprinted in Bureau of National Affairs, Daily Report for Executives (August 16, 1985), p. A-4.

I trust this information is responsive to your request. If not, please let me know.

Sincerely yours,

James C. Miller III
Chairman

Enclosures

c: William V. Roth, Jr.

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF
THE CHAIRMAN

December 10, 1984

COMMISSION MEMORANDUM

Subject: Equal Employment Opportunity and
Affirmative Recruitment

I am encouraged by the progress the Commission is making with respect to equal employment opportunity. An indication of this progress can be found in the attached summaries.

Please note there has been a rise in: (a) the proportion of minorities and women in full-time permanent positions, (b) the average grade of minorities and women, (c) the proportion of minorities in the GS-13 to GS-15 grade group, and (d) the proportion of women in the GS-16 and SES corps. In addition, the number of offers to experienced minority attorneys and economists is up significantly, reflecting in part our affirmative recruitment efforts.

This progress would not have been possible without you. I therefore extend my personal thanks to all employees — managers, supervisors, and other staff members — for your personal commitment and support.

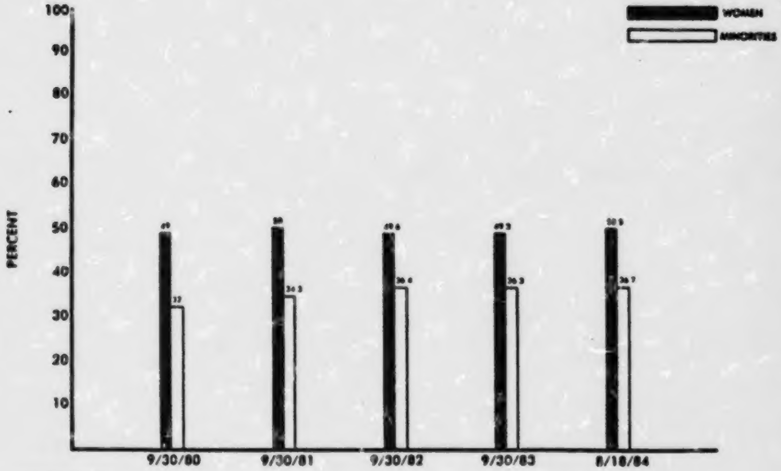
We shall not rest on our laurels. Let us resolve to do even better.

James C. Miller III
Chairman

Attachments

FEDERAL TRADE COMMISSION

PERCENTAGES OF WOMEN AND MINORITIES
IN FULL-TIME PERMANENT POPULATION

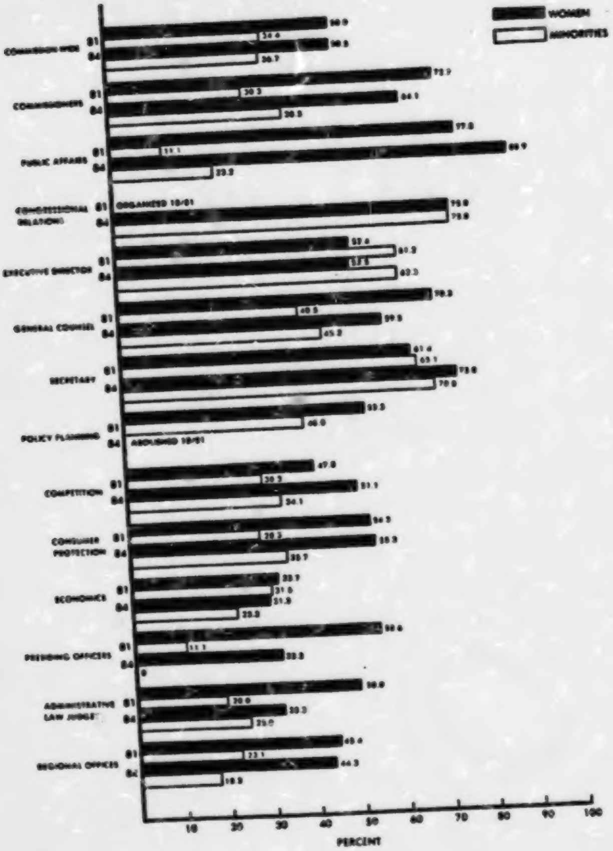


	9/30/80	9/30/81	9/30/82	9/30/83	8/18/84
NONMINORITY MEN	663	599	536	479	473
NONMINORITY WOMEN	410	382	315	256	258
MINORITY MEN	143	148	138	105	98
MINORITY WOMEN	362	365	349	313	325
TOTAL:	1,580	1,494	1,338	1,153	1,154

Notes

- There were 426 fewer full-time permanent employees in 1984 than in 1980, a decrease of 27 percent.
- The employment of women decreased 24.5 percent; there were 152 fewer nonminority women and 37 fewer minority women.
- Minority employment declined by 82, or 16.2 percent, during this period.

FEDERAL TRADE COMMISSION
COMPARISON OF 9/30/81 and 2/18/84
PERCENTAGES OF WOMEN AND MINORITIES
IN FULL-TIME PERMANENT POPULATION
BY ORGANIZATION



Notes

- The representation of women increased between 1981 and 1984 in all but six organizations.
- Minority representation increased between 1981 and 1984 in all but three organizations.

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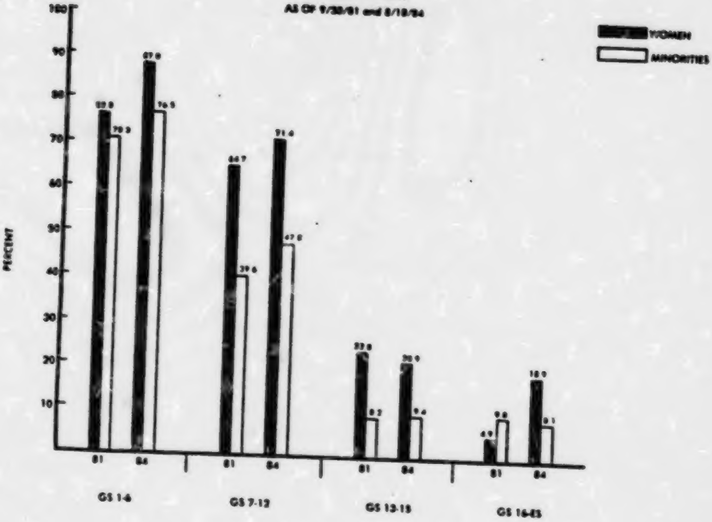
FEDERAL TRADE COMMISSION

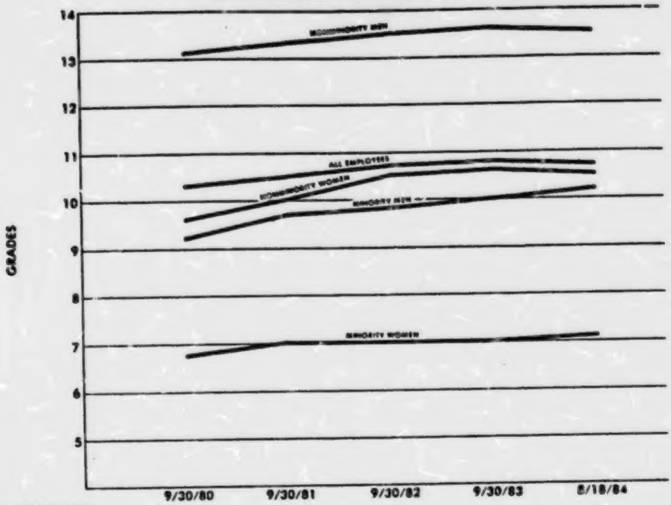
PERCENTAGES OF WOMEN AND MINORITIES
IN FULL-TIME PERMANENT POPULATION
BY GRADE GROUPS
AS OF 9/30/81 and 8/18/84



Notes

- Between 1981 and 1984, the representation of women increased in the GS-1 to 6, 7 to 12, and 16 to ES grade groups.
- During the same period, minority representation increased in GS-1 to 6, 7 to 12, and 13 to 15 grade groups.

FEDERAL TRADE COMMISSION
AVERAGE GRADE OF FULL-TIME PERMANENT POPULATION



AVERAGE GRADES OF:	9/30/80	9/30/81	9/30/82	9/30/83	8/18/84
ALL EMPLOYEES	10.3	10.5	10.7	10.8	10.7
NONMINORITY MEN	13.1	13.3	13.5	13.6	13.5
NONMINORITY WOMEN	9.6	10.0	10.5	10.6	10.5
MINORITY MEN	9.2	9.7	9.8	10.0	10.2
MINORITY WOMEN	6.7	7.0	7.0	7.0	7.1

Notes

- The overall average grade increased slightly between 1980 and 1984.
- The average grade of women increased from 8.2 to 8.6.
- The average grade of minorities increased from 7.3 to 7.8.

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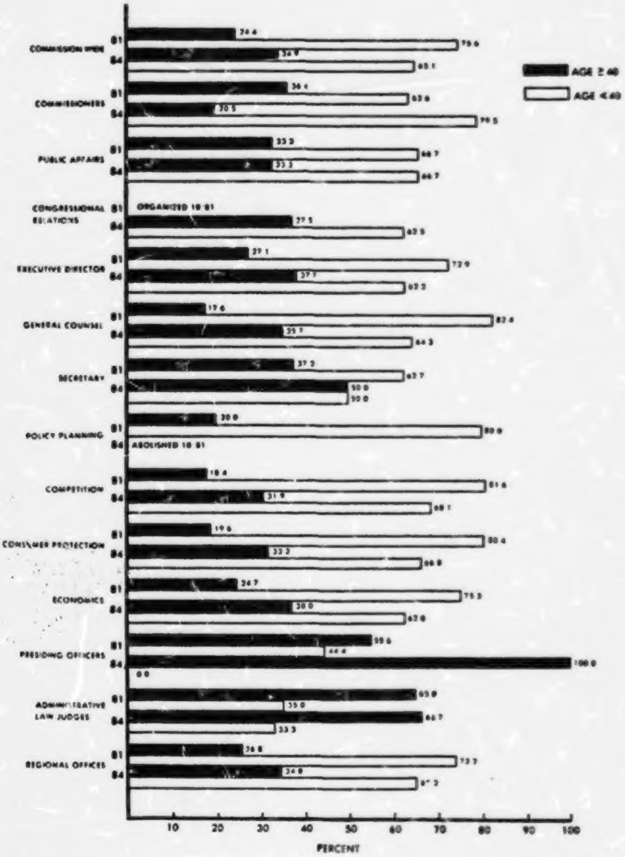
FEDERAL TRADE COMMISSION

PERCENTAGES OF EMPLOYEES BY AGE GROUPS
IN FULL-TIME PERMANENT POPULATION
BY ORGANIZATION

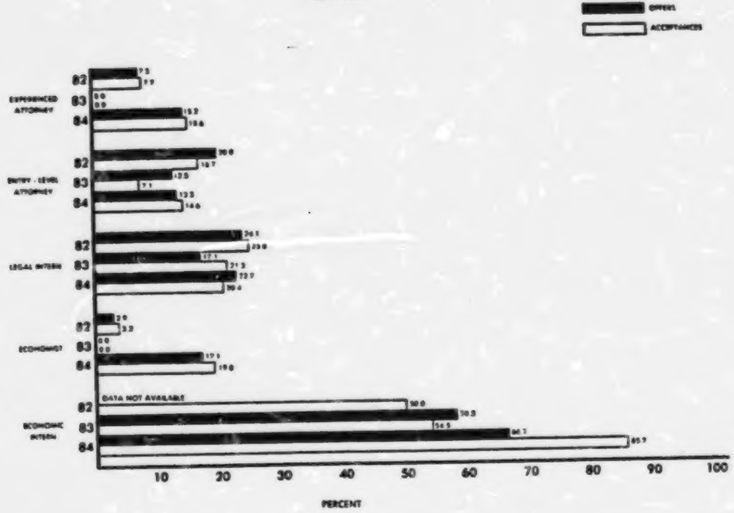


Note

- The representation of employees age 40 and above increased in all but two organizations.

FEDERAL TRADE COMMISSION

PERCENTAGE OF MINORITY
HIRING OFFERS AND ACCEPTANCES
IN SELECTED OCCUPATIONS
1982 - 1984



Notes

- Offers and acceptances to minority experienced attorneys, economists, and economic interns increased significantly in 1984.
- Entry-level attorney and legal intern offers and acceptances to minorities remained high.

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EXECUTIVE ORDER

Section 1:

By the authority vested in me as President by the Constitution and statutes of the United States, and in order to further the purposes of Executive Order No. 11246, which mandates that contractors with the federal Government "not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin," it is hereby ordered that the following subpart is added to Part II of Executive Order No. 11246:

Subpart F - AFFIRMATIVE RECRUITMENT AND TRAINING PROGRAMS REQUIRED PURSUANT TO REGULATIONS OF THE SECRETARY; PREFERENTIAL TREATMENT NEITHER REQUIRED NOR GIVEN A LEGAL BASIS BY THIS EXECUTIVE ORDER.

Sec. 216 Each Government contractor and subcontractor shall engage in affirmative recruitment and employment-related training programs designed to ensure that minorities and women receive full consideration for hiring and promotion. Such affirmative programs shall be developed pursuant to regulations promulgated by the Secretary of Labor, and shall describe the actions to be taken, including timeframes for taking such actions, to accomplish the objective of expanding the number of qualified minorities and women who receive full consideration for hiring and promotion.

Sec. 217 Nothing in this Executive Order shall be interpreted to require or to provide a legal basis for a Government contractor or subcontractor to utilize any numerical quota, goal, or ratio, or otherwise to discriminate against, or grant any preference to, any individual or group on the basis of race, color, religion, sex, or national origin with respect to any aspect of employment, including but not limited to recruitment, hiring, promotion, upgrading, demotion, transfer, layoff, termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. Nor shall any Government contractor or subcontractor be determined to have violated this Order due to a failure to adopt or attain any statistical measures. Further, nothing in this Order shall be interpreted to require or provide a legal basis for any Government contractor or subcontractor to exclude or in any respect limit the participation of any individual in any recruitment or training program on the basis of race, color, religion, sex, or national origin.

Section 2:

(a) The Secretary of Labor shall immediately revoke all regulations and guidelines promulgated pursuant to Executive Order No. 11246 inconsistent with this Order in that they require or provide a legal basis for a government contractor or subcontractor to use numerical quotas, goals, ratios or objectives, or otherwise to discriminate or grant such preferences as described in Section 217.

(b) The Secretary also shall, within 30 days of the effective date of this ORder, issue such further regulations as are necessary to carry out the purposes of the Order which, where necessary for the integrity of ongoing programs, may be in the form of interim final regulations to be applicable during this interim period. Such regulations shall:

(1) ensure that the requirements of Section 216 will be met by Government contractors and subcontractors; and

(2) provide that compliance with this Order shall be determined on the basis of each Government contractor's and subcontractor's demonstrated nondiscriminatory treatment of its employees and potential employees without regard to race, color, religion, sex, or national origin, irrespective of the number of minorities and women recruited, trained, hired or promoted by the contractor or subcontractor.

Section 3:

This Order shall become effective immediately.

Senator Eagleton. Speaking of Executive orders, Senator Gore probed the first Executive order dealing with regulatory reform and matters similar thereto. It was No. 12291, and that was issued in 1981.

Now, there is another Executive order that I don't think he touched on, or if he did, it slipped by me. That is No. 12294, and it was signed very recently, January 1985.

This 1985 order, in essence, gets OMB in on the ground floor of potential regulatory action. It requires each agency to submit a regulatory agenda, each year, that includes any actions, and I will quote "planned or under way, including the development of documents that may influence, anticipate or could lead to the commencement of rulemaking proceedings."

This, as I read it, is a very wide net. No action may stay on an agency's regulatory agenda without OMB approval, and the agency cannot take any such action during the year unless it is on the approved regulatory agenda, as I read the order.

Would you comment on this second, more recent order?

Mr. Miller. I think it is a very positive, comprehensive step toward managing the whole regulatory process. It is a step toward openness. It is a step that will give members of the public more advance notice of what individual regulatory agencies major initiatives.

It also serves to coordinate actions by agencies that have cross-cutting interests in some of these matters. So I see it not unlike the steps that were proposed toward the development of the so-called regulatory budget. It gives Congress, it gives the President, it gives people who are not in the Government, a better perspective on what the overall regulatory activities of our Federal Government are.

Senator Eagleton. Is the agenda that the agency submits to you, in fact, a binding agenda for the year?

Mr. Miller. As I recollect, there are provisions for a waiver, for example, if Congress passed a law that said we must deal with a certain issue immediately. The law would, of course, be overriding.

Senator Eagleton. If OMB knocks something off the agenda, that is it?

Mr. Miller. There would be discussions between OMB and the agencies, about the way an agenda item was presented, for example. Eventually, I suspect, it would get in the agenda. Keep in mind that—at least this was the experience when I was at OMB—the vast majority of proposals, were accepted by OMB with no comment at all.

Senator Eagleton. Would OMB give Congress the submissions from the agency, that is, the agenda that they submit to you?

Mr. Miller. I would personally have no aversion to doing that, following the same process that was envisioned in legislation that this committee reported out with respect to proposed regulations; that is, after the legislative agenda had been published, OMB making public copies of whatever proposals the agencies had made.

Senator Eagleton. Do you intend to try to bring the independent agencies within the purview of either two Executive orders, the one Senator Gore talked about or the one I talked about?

Mr. **Miller**. Senator, that is a very important question. At the time the President issued 12291, the Office of Legal Counsel of the Department of Justice indicated very clearly it was their view that the President could apply the Executive order to the independent agencies, just as they advised President Carter at the time he issued his Executive order.

This reasoning was predicated on some of the same rationale the Supreme Court used in the finding in the *Chadha* case, that the legislative veto was unconstitutional.

The *Chadha* decision raises a question about the whole nature of independent agencies. It tends to remove the distinction between independent and executive branch agencies.

For example, when the Supreme Court found that the legislative veto affecting the Federal Trade Commission was unconstitutional, it did so with the rationale that when the Federal Trade Commission was involved in a rulemaking, it was involved in an executive branch function. Therefore, the powers indoctrined in the Constitution meant there was no distinction.

The corollary is because of the separation of powers adopted in the Constitution, there is no distinction between the Federal Trade Commission in, say, a rulemaking proceeding and an executive branch agency—except, of course, that the members making the decision have to be removed for cause. The President doesn't have the authority to recall them at any time.

But that is a long way of saying that the issue of independent versus executive branch agencies is one I think the Congress needs to grapple with in the years to come. Until that is sorted out, I would not anticipate that any attempt would be made to apply either of those Executive orders to the so-called independent agencies.

Senator **Stevens**. If the Senator would yield a minute, we have a vote scheduled at 2:20 on Senator Roth's amendment. I am going to join in on that. We will resume the hearing after the vote. I appreciate your frank responses and am sure that there is room in this process of our Government for a difference of opinion. I just want to make certain that we are ready to approach some of these very critical problems; that we don't find ourselves looking at a fait accompli before we have the chance to have the debate which I think is essential. I appreciate your frank answers.

Mr. **Miller**. Thank you, sir.

Senator **Eagleton** [presiding]. So that everyone can follow us, we were talking about independent agencies versus nonindependent agencies. Independent agencies include the FCC, the ICC, the FTC, et cetera.

With respect, Mr. Miller, to the submissions that you said you would have no problem in, and personally have no problem giving us the submissions from the agency to OMB, when Congressman Dingell asked this year for agency submissions, Mr. Stockman complied with that request.

But then he added, in a memo to the agency heads,

> Although the draft regulatory plans are clearly within the deliberative process, disclosure of them this year, given the unique circumstances, is not likely further to impair that process within the executive branch or other aspects of the executive branch's constitutional duties.

As we read what he said, he gave Mr. Dingell the submissions this year, but the inference is they are not going to get them any further. Am I making the wrong inference?

Mr. MILLER. Senator Eagleton, if you confirm me, I will be Director of OMB, not Mr. Stockman.

Senator EAGLETON. Now I am going to move on to your tenure at the Federal Trade Commission.

First, the question of secrecy. I am very much in favor of openness in Government. This committee has a significant jurisdiction over legislation dealing with openness in Government.

While you were at the FTC in 1954, there was a meeting concerning whether the Commission should testify before Congress on the GM-Toyota issue.

Mr. MILLER. 1984.

Senator EAGLETON. 1984, I'm sorry.

Mr. MILLER. I was just a youngster then, sir.

Senator EAGLETON. OK. Although the meeting, in the end, was public, you wanted the meeting closed, and you moved that it be closed. In an internal memo, you explained that your concern was that "certain individuals outside the commission might be embarrassed." That memo is dated January 27, 1984.

So my question is, Does embarrassment qualify as some kind of a homemade exemption under the Sunshine Act?

Mr. MILLER. Senator, please share with me a copy of that memorandum. It is very difficult for me to respond just on that very short phrase. I have no idea what I was talking about in that context.

Senator EAGLETON. We will move on while they are digging it up, OK?

Mr. MILLER. Thank you.

Senator EAGLETON. Let's go on to another one. There was a meeting of the Commission. It had to do with its deliberation over your proposal to close regional offices. Once again, it is our belief that your initial proposal was to have that be a private meeting, even though you obviously realized that closing regional offices would be of great interest to the Congress and, indeed, to the public.

Could you give us your thinking on that one?

Mr. MILLER. The reason for closing that meeting was that we had to discuss, in some detail, the caseload at the various regional offices. Each regional office has certain enforcement proceedings underway, and for us to make all of that public would cause serious problems. For example, somebody who was about to be sued would cash in their chips and run for the hills and that sort of thing.

Senator EAGLETON. We have had this before; that is, where agency heads cleverly comingle that which is self-evidently public, a public issue in this instance being whether to downsize the number of regional offices. "Should we do it? Should we not do it?"

Then they comingle that public decision with sometimes investigatory, private discussions which would, therefore, put the cloak of secrecy over the whole thing.

Was that your intent in this instance?

Mr. MILLER. No; on some occasions, we have had bifurcated meetings, that is, we have had a portion of the meeting that would be open and a portion of it that would be closed. On the issue of closing regional offices, I would point out that we had a whole day of hearings before then-chairman Benjamin Rosenthal and one of the oversight committees in the House.

So the matter was aired publicly in considerable detail.

Senator **Eagleton**. Generally, let me ask you this: Putting aside sensitive national security matters, and you deal in part with those at OMB and things related to intelligence, civic aspects, perhaps military weaponry that still might be inside of some secret domain, putting all that aside, national security types of things aside, how open will your operation of OMB be within all other respects?

Mr. **Miller**. I am just a plain old country boy, and I believe that what you see is what you get. I have nothing to hide. I think things should be as open as possible.

On the other hand, I am aware that the deliberative process needs to be protected, and I am also aware that for OMB, ad hoc, to throw certain things open can set a precedent that would mean that other kinds of activities engaged in by the Executive office of the President might be subject to public scrutiny in a way that would chill the deliberative process there, as well.

So we have to be careful, it seems to me, of how we go about designing these things. I have been head of an agency for which there has been hardly ever any claim of privilege. The only time that I can remember a claim of executive privilege on the part of the Federal Trade Commission while I was there was in a comment when the President solicited comments on a particular piece, and we were asked for a copy of the comment by a chairman of a subcommittee.

As I remember, someone at the Commission by mistake, gave it to a staff member from the subcommittee. But we ultimately asserted executive privilege, because it was a direct communication between the commissioners and the President of the United States.

But my goodness, the committees in the Congress and the Senate have had access to virtually all conceivable information at the Federal Trade Commission, even including personal notes taken down by members of the staff in chatting on the telephone with possible litigants and with others who had information, never thinking that those notes would be subject to public scrutiny and therefore not particularly writing them in a way that would be easily understood.

I just saw Mr. McLain from the House Commerce Oversight Subcommittee. I suspect that he would be willing to affirm that they have had access to everything they could possibly want.

Senator **Eagleton**. Here is the memo that I was referring to.

Mr. **Miller**. May I have it?

Senator **Eagleton**. I will hand it to you after I read an excerpt from it. Do you have it?

Mr. **Miller**. I have just been handed this. What page is it?

Senator **Eagleton**. A brown volume entitled on the front sheet, "FTC review, 1977-1984".

Mr. **Miller**. Oh, yes. Yes. Right.

Senator **Eagleton**. We are on page 220. The footnote calls it "no. 126, memorandum from Chairman Miller to the Commission, January 27, 1984" and I will read from this book.

> Another instance of Miller's penchant for secrecy occurred in connection with a Commission meeting to consider testifying before Congress. When Miller moved that the meeting be closed to the public, I—

And that is Pertschuk—

> Responded by asking that the meeting be open or at least split into an open and closed session. Miller finally capitulated, and the entire meeting was conducted in the open, but not before Miller explained his rationale for initially voting to close the meeting.

This is a quote from Miller:

> I felt that a closed meeting would prevent any constraints on the commissioners' discussions that might occur from the natural desire to avoid touching on sensitive issues that might result in unnecessary public controversy or perhaps embarrass certain individuals outside the Commission if discussed in an open meeting.

End of quote.

That is what I referred to in my earlier question.

Mr. **Miller**. Yes.

Well, Senator, it just cites a memorandum from me. I don't have a copy of the memorandum. I don't even have any idea what the subject matter of the memorandum was, or what the subject matter of the meeting was.

Senator **Eagleton**. It is on the GM-Toyota issue, a very important issue; do you remember?

Mr. **Miller**. On January, what?

Senator **Eagleton**. It says January 27, 1984.

Mr. **Miller**. I would be more than happy to respond in the record. I just have no recollection of this whatsoever. There have—I just can't respond. I just don't know what it is talking at about.

Senator **Eagleton**. Search out the memorandum specifically identified and the quote that appears here in this book, and then respond for the record on the subject matter.

[The information referred to follows:]

FEDERAL TRADE COMMISSION
WASHINGTON D C 20580

OFFICE OF
THE CHAIRMAN

January 27, 1984

MEMORANDUM

TO: COMMISSION

FROM: CHAIRMAN MILLER

RE: COMMISSION MEETING ON CHAIRMAN FLORIO'S REQUEST FOR TESTIMONY

I believe that the Sunshine Notice prepared by the General Counsel's Office scheduling a closed meeting to discuss Chairman Florio's request for testimony concerning the decision reached and procedures used in the Commission's investigation of the GM/Toyota joint venture correctly concluded that the meeting should be closed in order to avoid disclosure of nonpublic information. I recognize, however, that this issue is a close one. For my part, the balance was tipped in favor of a closed meeting by one further consideration. I felt that a closed meeting would prevent any constraints on the Commissioners' discussions that might occur from a natural desire to avoid touching on sensitive issues that might result in unnecessary public controversy and perhaps embarass certain individuals outside the Commission if discussed in an open meeting.

After reviewing Commissioner Pertschuk's circulation of January 26, 1984, and given his evidently strong views on the subject, however, I am persuaded that the public should have access to all aspects of our discussions that do not involve disclosure of nonpublic information. I am therefore voting "yes" on Commissioner Pertschuk's motion that the Sunshine Notice be closed to the public only when the need arises to discuss nonpublic matters.

Mr. **Miller**. We do have, from time to time, a reason to close an investigation because the deliberative process would be impaired that is, because we need to talk about what various actors have said, what various representations have been made to us that they would not want to be made public, and we must preserve the integrity of those communications. That may have been what I meant by "embarrass". Some of the commissioners might pull their punches or lessen the value of such a meeting if it were public.

I will just have to respond to that for the record.

Senator **Eagleton**. The curious word there is "embarrass", because there is no loophole in the Sunshine Act or any public disclosure act that says, "Well, something, a little old something that is a little bit embarrassing to somebody, we can close that one up."

Mr. **Miller**. I think what the statement on its face does not mean, is to embarrass the Commission.

Senator **Eagleton**. No, it said outside individual.

Mr. **Miller**. Yes, it might embarrass an outside individual, and therefore a commissioner would be reluctant to raise it.

Senator **Eagleton**. I mentioned earlier that we would get into this area of deception. By way of background, that was a very contentious issue before the Commission.

Deception, as a word of art, was legislated into the FTC Act in 1938. You, then, wanted to change the statutory definition. You came to Congress, and you were rebuffed on a bipartisan basis on that idea.

You didn't like that. A lot of people don't like it when they are rebuffed by Congress, when they don't get their way.

So you thought that, well, you would sort of change the terminology of deception in-house, and you did. So let me give you one of the cases. I can just get your comment on it. It illustrates what the Miller definition of deception means versus the one that had been used since 1938. The case I use is Ford Motor Co., 87 FTC 756. There was a time in the early 1970's, of course, when we were in the heyday of the energy crisis. There was a tremendous gas shortage. People, as we all know, were lined up for blocks to get some gasoline. People felt desperate.

And the Ford Motor Co. put out a huge full-page ad in the Nation's newspapers claiming, "All Five Ford Motor Co. Small Cars Get over 26 mpg" end of quote. That was in very big print. In teensy, weensy, tiny print, squeezed at the bottom of the page was a disclaimer, "Actual mileage might vary, according to—" and it listed several things.

These disclaimers were in very, very tiny print. The FTC studied this Ford ad; it had reason to believe that Ford could not uphold the claim, so it asked Ford to explain, to justify this quote, "Over 26 mpg". Ford said it had no basis. All Ford could point to was one driving test on one particular day when a handful of expert drivers driving under perfect conditions got 26 mpg.

Ford denied that its ad meant that all consumers could get 26 mpg. Thus, we get to the point of what the FTC did. It said that a consumer "acting reasonably" would be justified in believing Ford intended to communicate to the average consumer they would get 26 mpg, despite the disclaimer and Ford was ordered to change its ad.

Now, would the result of that Ford case, and I set forth the facts as we best know them, would it have been changed if the Miller definition of deception were in place at the time the Ford case was decided? Is that not the case?

Mr. **Miller**. Senator, it would depend on the facts. I don't think we know all the facts. I think one piece of information that would be relevant would be what consumers would think of the ad. If the Ford Motor Co. had no more evidence, substantiating evidence of that, probably, under my definition, they would be guilty of a law violation.

But it would really depend on the facts put forward.

I would also take issue with the characterization, Senator, that we changed the law. In promulgating our deception standard, I think we did more to clarify what the status of the law on deception was at that point in time than to change the law.

Moreover, I think it is clearly within the prerogative of the Federal Trade Commission to articulate what it believes the standard for deception might be if Congress does not give any more guidance.

Senator **Eagleton**. Then why did you come to Congress in the first place?

Mr. **Miller**. I thought it was better for the long run that we obtain from Congress' precisely what it meant by the term deception.

For various reasons, the Congress did not define deception, so we needed to articulate what we thought deception meant. I think that is purely, absolutely within the prerogatives of the Federal Trade Commission, and it was a much better policy than just leaving it inarticulate, as it was.

Senator **Eagleton**. So you clarified?

Mr. **Miller**. Yes.

Senator **Eagleton**. A lot of mischievous things can be done in the name of clarification.

You don't think in this Ford example that I have given to you that your new clarified definition would have impacted on the outcome?

Mr. **Miller**. It conceivably might. One of the things that I thought you were leading up to was the issue of a reasonable perception of what the ad says. But what you just read included that. That was one of the controversial parts of the so-called new deception standard.

There had been times in the past when the Federal Trade Commission had taken issue with an advertisement on the basis of its own interpretation of what the ad meant, where a person acting reasonably under circumstances would not have made that specific interpretation.

One example that is kind of humorous is that on one occasion, a manufacturer of a hair dye advertised that it was a permanent hair dye. It was during the development of these hair dyes, where the stuff would be more likely to wash out of the hair. They had made some technological breakthrough, so that it was more permanent in the use of——

Senator **Eagleton**. It wouldn't work on you.

Mr. Miller. It wouldn't work on me very much. I have too little there to be of much use.

In any event, the advertisement was for a hair dye. The Federal Trade Commission took the view that "permanent" meant that when your hair grew out, it would remain that color. Consumers did not reasonably interpret that ad to meant that hair would stay that color even when it grew out.

So we put in that reasonable interpretation provision, which was almost the exact language that you just read to me awhile ago.

Senator Eagleton. If your change of definition was simply clarification and thus inherently benign, why did the Attorneys General of the United States, the State lawyers, get up in arms about this?

Mr. Miller. I think it was due to a great misunderstanding of what it was all about. Believe it or not, we received some letters from State attorneys general, and also had a campaign on the part of people who had notions of their own of what the appropriate approach for the Federal Trade Commission to take was. I received, for example, a letter from a State attorneys general taking issue with the definition of deception which was a carbon copy of a letter they had sent when the Commission was clarifying its definition of unfairness. So some of them were completely off the mark in their criticism. They had been given bum information.

Senator Eagleton. I will put in the record the objections of the State attorneys general, including the National Association of Attorneys General, and then some specific letters from the attorney general of Michigan and the attorney general of California.

[The information referred to follows:]

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Winter Meeting
Honolulu, Hawaii
December 5-9, 1983

RESOLUTION

IV

FTC DECEPTION STANDARD AND DEFINITION

WHEREAS, virtually every state prohibits deceptive practices and approximately 30 states also prohibit unfair and deceptive acts or practices; and

WHEREAS, 20 state statutes state explicitly that state courts should follow Federal Trade Commission and federal court interpretations of the FTC Act, and where statutes do not contain this explicit directive, most state courts have interpreted state statutes consistent with the FTC Act; and

WHEREAS, the FTC has recently adopted a statement of policy that purports to summarize the case law of "deception"; and

WHEREAS, members of the FTC had previously made a similar proposal for a legislative definition of "deception" in the FTC Act--one that would seriously limit the authority of the Commission to protect the American public from deceptive business practices; and

WHEREAS, the adoption of such definition would substantially impair the ability of Attorneys General to protect consumers in each state, both directly by potentially impairing legal interpretations of state laws based on §5, and indirectly by shifting a greater burden for enforcement against interstate deceptive practices on the states; and

WHEREAS, this action by the Federal Trade Commission will have substantial adverse consequences on the states and the public; and

WHEREAS, the National Association of Attorneys General has previously resolved to oppose the adoption by Congress of such an altered definition; and

* WHEREAS, this FTC policy statement describes "deception" in a manner substantially different from the existing case law, would depart from the principles developed over decades of Federal Trade Commission enforcement, and seeks to adopt administratively the restrictive definition not enacted by the Congress;

NOW, THEREFORE, BE IT RESOLVED, that the National Association of Attorneys General:

1. Reaffirms its earlier position opposing any amendment to the Federal Trade Commission Act defining deception;
2. Opposes administrative changes to the definition of deception;
3. Opposes the restrictive description of the law of deception recently adopted by the FTC; and
4. Urges the Congress that if it wishes to amend the FTC Act in such a way that may affect state law, these changes should be subject to extensive study and consultation with the state Governors, legislators, and Attorneys General prior to enactment.

BE IT FURTHER RESOLVED, that the National Association of Attorneys General authorizes its General Counsel to make these views known to the members of Congress, the Administration, the Federal Trade Commission, and other appropriate parties.

APPENDIX "A"

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

STANLEY D. STEINBORN
Chief Assistant Attorney General

FRANK J. KELLEY
ATTORNEY GENERAL

LANSING
48913

RECEIVED
1984 APR 18 PM 3:18
ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES

April 3, 1984

Honorable John D. Dingell, Chairman
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515

Dear Chairman Dingell: John

It is my understanding that Messrs. Easton and Miller will be giving testimony before your subcommittee regarding the proposed changes to the Federal Trade Commission Act. I am similarly concerned that the proposed changes will weaken consumer protection at the federal level and create a "ripple effect" among the states.

Many of the state laws are so-called "little FTC Acts" and changes at the federal level will impair local enforcement efforts. The National Association of Attorneys General has taken a position with which I concur.

I urge you to be cognizant of my concerns and those of my fellow Attorneys General as your subcommittee hears the testimony and considers what action will be taken. Substantial protections should not be removed from the market place without clear and cogent evidence that they are no longer needed.

Sincerely,

Frank

FRANK J. KELLEY
Attorney General

JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE
3580 WILSHIRE BOULEVARD, ROOM 800
LOS ANGELES 90010
(213) 736-2304

March 15, 1984

Federal Trade Commission
Washington, D.C. 20580

Attention: Commissioner Michael Pertschuk

In Re: The Law of Deception

Dear Commissioner Pertschuk:

Your February 28, 1984 letter to Honorable John Dingell and the analysis of the law of deception by you and Commissioner Patricia Bailey mirrors the long standing interpretation by our office. We are concerned with new definitions of deception by the Federal Trade Commission. The California courts have held that because of the similarity of the language and the obvious identity of purpose of the Federal Trade Commission Act and the California Consumer Protection statutes, federal law in the area of consumer protection is more than ordinarily persuasive in California and cases decided under the Federal Trade Commission Act are recognized as good authority in California. Schwartz v. Slenderella Systems of California (1954) 43 Cal.2d 107, 111; People ex Rel Mosk v. National Research Co. of Cal. (1962) 201 Cal.App.2d 765, 773. See also Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94, 110. Changes in definitions render previous federal decisions by the Federal Trade Commission and the federal courts questionable and new definitions allow new arguments by trial counsel.

Hence, changes in definition can certainly affect state actions in California. Few state agencies have sufficient manpower to litigate every case they wish to prosecute. Settlements can usually be obtained if opposing counsel is convinced that the client will lose any way. Use of new concepts such as the reasonable consumer and consumer detriment may lead trial counsel to wish to litigate cases that could otherwise be settled. If these new definitions are merely consistent with previous Federal Trade Commission decisions, there is no need to adopt them. The adoption creates uncertainty and adversely affects consumer protection. We have discussed these definitions with other state attorney general's offices throughout the country. Those attorneys working in this field generally believe that these definitions involve changes. How much more so will that argument be made by defense counsel?

Yours very truly,

JOHN K. VAN DE KAMP
Attorney General

HERSCHEL T. ELKINS
Assistant Attorney General

HTE/pt

Mr. **Miller**. Could I also maybe point out, Senator, many States have little FTC acts, and some of those tend to be governed by whatever the Federal Trade Commission does in terms of its definition.

Some State attorneys general, perhaps, preferred to have a more open-ended definition of deception. It gives them more flexibility. And they would have preferred the Federal Trade Commission not explain what it meant by its definition.

Senator **Eagleton**. All right. I will move onto another subject matter. The Grace Commission was, in part, the creation of the Office of Management and Budget; they strongly encouraged that there be such a thing and strongly encouraged its function and stayed in touch with it while it was operating, et cetera. This committee had a session with Mr. Grace one day not too long ago.

The Grace Commission made numerous far-flung recommendations, lots of volumes in the report. I am going to quickly read through a partial list of current Government functions, things that the Government is currently doing, which the Grace Commission believes could be eliminated or substantially changed, either eliminated outright, or substantially changed.

I am going to ask you as I go down this list whether you agree that the Government should eliminate; if it is your belief that it should eliminate, say so; or if it should substantially change, and if you believe it should substantially change, say so; or leave alone, basically leave alone. These are all from the Grace report.

First, to delegate to the States the job of running water pollution programs.

Mr. **Miller**. I would have to see the backup. I have not read the Grace Commission report in enough detail to respond to each of these things. I think that is worthwhile considering, but I don't know.

Senator **Eagleton**. As we go down the list, when there may be some that you are more aware of than there are others, and I am going to continue to go down the list.

Mr. **Miller**. Yes.

Senator **Eagleton**. Accelerate delegation of responsibility to the States for enforcing the environmental protection regulations.

Mr. **Miller**. An idea worth considering.

Senator **Eagleton**. Reduce Federal oversight of regional-State environmental operations.

Mr. **Miller**. Worth considering, in tandem with the others.

Senator **Eagleton**. I'm sorry?

Mr. **Miller**. In tandem with the others.

Senator **Eagleton**. Grant blanket permits for general classes of hazardous waste facilities.

Mr. **Miller**. I don't know.

Senator **Eagleton**. Close or merge several of the Environmental Protection Agency's testing labs, close or merge.

Mr. **Miller**. Worth considering.

Senator **Eagleton**. Reduce, and in the words of the Grace Commission, the "intensity," reduce the intensity of the Federal inspection of meat, poultry, and egg processing operations.

Mr. **Miller**. Worth considering.

Senator **Eagleton**. Allow industry personnel to conduct their own postslaughter poultry inspections.

Mr. **Miller**. Worth considering.

Senator **Eagleton**. Discontinue requirements for prior Federal approval of labels for meat and poultry products.

Mr. **Miller**. I don't know.

Senator **Eagleton**. Sell the five Federal power administrations and allow them to be run by the private sector.

Mr. **Miller**. Worth considering.

Senator **Eagleton**. Privatize future planned space shuttles.

Mr. **Miller**. Worth considering.

Senator **Eagleton**. Privatize the VA hospitals and nursing homes.

Mr. **Miller**. Worth considering.

Senator **Eagleton**. Privatize military commissary operations.

Mr. **Miller**. Again, worth considering.

Senator **Eagleton**. Privatize the Federal vehicle fleet management.

Mr. **Miller**. Yes, worth considering.

Senator **Eagleton**. Privatize selected Coast Guard services in the areas of search and rescue, aids to navigation, and the like.

Mr. **Miller**. Worth considering.

Senator **Eagleton**. On the subject of the Grace Commission, I guess in addition to some of their recommendations, a portion of which I have just read—I emphasize the word partial, a partial list of which I have just read to you—perhaps the area of greatest contention was their estimate of cost savings.

Mr. Grace here and in his travels in the country is fond of reciting these statistics. He said the Commission, his commission, produced 12,000 pages of material supporting 2,478 recommendations that he said would save $425 billion over a 3-year period.

OMB, in its own report of February 1985, said that through the fiscal year 1986 budget, 70 percent of the Grace Commission's recommendations will have been implemented. So if I am hearing it all right, it sounds as if you have been able to take a huge whack at our enormous budget deficit by implementing 70 percent of Grace's recommendations that he says would save $425 billion over 3 years.

How does that all set with you?

Mr. **Miller**. Well, first of all, I'm not sure of whether the 70-percent figure was an across-the-board sample or whether it applies to recommendations that perhaps did not save as much money as some more substantive recommendations.

Second, there would be some phase-ins of saving over time. When you implement a recommendation, you might realize the savings only over a period of many years. I am not that familiar with the specifics of the Grace Commission recommendations to be able to tell you whether the figures you just read to me are credible.

Senator **Eagleton**. If you could save $425 billion over 3 years, then this $200 billion budget deficit that we are talking about could be substantially mitigated. Does your gut tell that we should follow Mr. Grace and save this $425 billion over 3 years?

Mr. **Miller**. As I recollect, many of the savings were transfers; that is, you would impose the costs on, say, local governments rather than the Federal Government. I think we have a policy decision to be made there as to the appropriate level of State-local versus Federal Government. Some such transfers might not result in net savings; they would be savings to one level of government but increased costs to another.

Senator **Eagleton**. No, he talks about net. He flies all over the country, and we talked to people that were present at his presentations, and he is a net-net man. Nothing is transfers. These are miraculous savings that he discovered and that are there just for the asking.

Mr. **Miller**. I think the Grace Commission has served a very important function: it has ferreted out a number of areas where substantial savings can be made through improvements in the efficiency with which Government delivers services. Whether every one of the proposed savings can be achieved, or every reform would be feasible to undertake, I would reserve judgment. I suspect the answer is no.

But I think it has served a useful function.

Senator **Eagleton**. Senator Stevens asked you about the military budget, and you mentioned you have done a couple of book reviews, but you did not hold yourself out as an expert on the specifics of that very complex budget, but I am just going to try you on some very basic things that are not very technical.

Just a few weeks ago, the Pentagon announced that it had found $4 billion, and they used the word found. It was there; they didn't know it had been there, and they found it. I don't know whether you read about it. There was quite a play in the press when they found $4 billion.

You are knowledgeable about budgetary matters. How does an agency all of a sudden find $4 billion?

Mr. **Miller**. I don't know.

I wish I could find $4 billion; $4,000 would be a windfall for me.

Senator **Eagleton**. Would it be something, though, that would very much command your attention when you were head of OMB?

Mr. **Miller**. Indeed, it would.

Senator **Eagleton**. The General Accounting Office found this intriguing one: That the Pentagon had overstated inflation, as far as their operations were concerned, $37 billion since fiscal year 1982. And they investigated a little further, and I can get you a copy of the report. It found, for instance, that $9 billion of this $37 billion windfall resulted directly from a special inflation multiplier that was invented by the administration and, in the opinion of the GAO, to exaggerate inflation for major weapon systems. Would you look into that?

Mr. **Miller**. I surely would.

We have experienced lower levels of inflation in the last year, generally speaking, than most people had anticipated.

So perhaps that is part of the problem. But if there is an artificial——

Senator **Eagleton**. The Defense Department always has this little "not so little" inflation kicker. They have always lived in a special world separate and apart from everybody else. It is this special kicker, the stamp, "Defense Department Only," that ratchets up some of these estimates and permits them to maybe, in part, to find $4 billion every once in awhile or then to add $37 billion more to spend than might otherwise have been appropriated.

Do you realize that a 30-percent kicker, what that would be worth to the Pentagon this year? That is what you are talking about, is a 30-percent kicker. It is worth about $3.6 billion. It is a not insignificant amount of money.

So would you look into this inflation kicker and the pricing of weapon systems and see whether it doesn't need considerable clarification, to use one of your own words?

Mr. MILLER. Yes.

Senator EAGLETON. In light of what you have just said, if nothing else.

Mr. MILLER. Yes.

Senator EAGLETON. That is, inflation rates are down from what they were 4 years ago.

Mr. MILLER. Right. I would be glad to.

Senator EAGLETON. Back to OIRA, your old department there at OMB, there is a publication in the Federal Register of a draft circular on March 15 which would give tremendous power over the collection and dissemination of information on a Governmentwide basis to OMB. Have you had a chance to see or been made away of the avalanche of negative comments as a result of that draft circular?

Mr. MILLER. No, I'm not aware of the comments.

Senator EAGLETON. Were you aware of this draft circular at all in the formulation?

Mr. MILLER. This was on information systems?

Senator EAGLETON. On the collection and dissemination of information on a Governmentwide basis.

Mr. MILLER. No, I don't think I'm familiar with it.

Senator EAGLETON. All right. We will submit that one to you in writing for some comments. One or two others in that area.

Mr. Miller, we may have, as I have already mentioned, some additional questions in writing. We hope we will tailor them down to a rational number. We would like the answers for the record. The record will be open for awhile.

Mr. MILLER. Senator, I will respond as expeditiously as possible.

Senator EAGLETON. I am very keen on that affirmative action.

Mr. MILLER. I will try to get what information I can.

Senator EAGLETON. I have every good intention to move this nomination expeditiously. I am for that.

Mr. MILLER. Thank you.

Senator EAGLETON. I think you ought to get about your business. However, I do not take lightly affirmative action, and I do want an answer on that before I agree to a markup.

I know that will take some time and some effort, but that one I want to have in advance. These others, I can blend into the report in due course. That one, I am pretty strong about.

Mr. Miller is excused. The committee will stand in recess for few minutes.

Mr. MILLER. Thank you.

[Responses to written questions from Senators Eagleton, Durenberger, and Chiles follow:]

RESPONSES TO WRITTEN QUESTIONS FROM SENATORS EAGLETON DURENBERGER AND CHILES

SENATOR EAGLETON

Information Management

On March 15, 1985, OMB published in the Federal Register for public comment a draft circular titled, "Management of Federal Information Resources." The draft circular, when finalized, will vest in OMB significant power over the collection and dissemination of information by agencies. It is an important document that has elicited an avalanche of negative comments from the public and from Members of Congress. Please familiarize yourself with it and with OMB's summary of the public comments, and then respond to these questions:

1. I understand a new draft of the proposed circular has been prepared. In view of the volume of negative response to the first draft, would you think it appropriate to have any revised draft also be subject to a period of public comments?

   There have already been two rounds of public comment on the draft circular. Comments were solicited first in a Federal Register notice on September 12, 1983, which listed 16 issues identified for consideration in developing the circular and invited public comment. The second round of public comment was initiated with the publication of the draft circular on March 15, 1985. OMB has analyzed the 350 comments it received on the draft circular and revised the circular to accommodate them. The resulting draft of the circular is being reviewed by staff. I will review the final draft and decide whether more public comment is needed.

2. Mr. Ginsburg, one of your successors at OIRA, testified before the House Subcommittee on Employment and Housing on July 17. In regard to electronic dissemination of government information, he seemed to say that he would oppose almost any government role in this burgeoning field. Here is the quote: "I think, on the dissemination side, it is clearer that the opportunities for private sector involvement are great. As we move particularly toward electronic dissemination of information, I am concerned about any efforts by the Federal

Government to do it by itself." Do you agree that there should be almost no role for non-private dissemination of government information by electronic means? What if the information companies do not want to disseminate a given type or kind of information? What happens to it after, presumably, the government has turned over distribution rights and no one wants to distribute it?

I believe private industry should be looked to first to disseminate government information by electronic means unless the law requires otherwise. In some cases, however, the government itself may have to undertake this function. The draft circular published on March 15, 1985, stated: "Agencies shall . . . disseminate government information products and services . . . in a manner that reasonably ensures the information will reach the members of the public the agency is responsible for reaching" (Section 8a(9)(a)). If information companies and others do not want to disseminate a particular type or kind of information, and if the agency determines that it has a responsibility to ensure that this information will reach certain members of the public in electronic form, then it becomes the responsibility of the Federal agency to see to the dissemination of government information by electronic means.

3. How do you respond to the concerns that have been raised to the effect that the public's access to information will suffer significantly from the new policy?

I do not believe that the draft circular would reduce the public's access to information at all. It is important to distinguish between access to information -- providing information to the public upon request -- and dissemination of information -- actively distributing information to the public irrespective of requests. The government's dissemination of information on what is available and how to access it allows the public to know what information is accessible.

The Freedom of Information Act requires each agency to publish in the Federal Register, for the guidance of the public, descriptions of agency organization; where and how the public may obtain information; the general course and methods by which agency functions are determined, including all procedural requirements; rules of procedure; descriptions of forms and how to obtain them; and revisions to all the foregoing (5 U.S.C. 552(a)(1)). The Privacy Act also requires publication of information concerning systems of records (5 U.S.C. 552a); the Sunshine Act requires agencies to make public announcement of meetings (5 U.S.C. 552b(e)(1)). The Paperwork Reduction Act (44 U.S.C. 3507(a)(2)) and OMB's regulation on Controlling Paperwork Burden on the Public (5 CFR 1320) require agencies to publish notices when they submit information collection requests for OMB approval, that describe the information collections and permit the public to comment.

In sum, every executive agency has legal obligations to disseminate basic information concerning what its information holdings are, and how the public can gain access to them.

In revising the draft circular, I will ensure that OMB describes more fully the relationship between information access and dissemination, and emphasizes agencies' responsibilities to disseminate information about their information holdings.

4. In your previous work as an economist, you must have relied to a considerable extent on information gathered, compiled, and disseminated by the government. Do you think it is reasonable to assume that all users of government information, including the general public, could afford to pay for it, either by purchasing information from the government directly or from a private entity that has obtained information from the government?

It is not reasonable to assume that all of those who use government information would be willing to pay the full cost of producing it. However, the Federal government does not have an obligation to provide unlimited information to all users at no cost. Through longstanding laws, policies, and procedures, Federal agencies, including the Government Printing Office, charge users for some of the costs associated with the provision of government information.

Protecting the free flow of information in our society does not mean, and has never meant, the government has an unqualified obligation to provide information free of charge to users.

5. I am concerned not only with the general public's access to government information, but also with that of Congress. You would agree, wouldn't you, that Congress has a legitimate interest in obtaining information on the government's operations? But the circular says, "(the) value of government information to the government (is) solely a function of the degree to which information contributes to achieving agencies' missions (Fed. Reg., March 15, 1985, p. 10739). Where does Congress fit in here? Will OMB be deciding what properly constitutes an agency's "mission"?

This draft circular does not affect Congress's right to information. The intent of this statement was to remind agencies that their valuation of government information derives from the laws defining their missions. Beyond the letter and spirit of such laws, the draft circular made clear that "the head of each agency shall have primary responsibility for managing agency information resources" (Section 9a (1)). If an agency's mission with respect to valuing certain government information is not adequately specified in law, the head of the agency would determine the valuation.

The comment on the draft circular indicate that the statement in question was not well understood. The final draft will be revised to clarify this point.

6. The government is bound to have a very significant presence in the so-called information market for a long time to come simply by virtue of the size and scope of its operations. The wording of the circular's policy on dissemination, though, seems to try to eliminate any and all competition between the government and the private sector. Is that goal an appropriate one?

Clearly, the government has, and will continue to have, a significant presence in the information market. In this sense, competition between the government and the private sector probably cannot be totally eliminated, and total elimination of competition would not be an appropriate goal.

7. In FY 1985 two major appropriations bills, Agriculture and Labor-HHS, provided for certain expenditures of funds which OMB attempted to circumvent. In the case of the Agriculture appropriation, Congress appropriated $1.5 billion for the WIC program, and OMB attempted to appropriate only $1.4 billion by spreading a 12-month allotment over 10 months.

In the case of the Labor-HHS appropriation, OMB sought to fund only 5,000 new and continuing grants at the National Institutes of Health when Congress appropriated funds for 6,500 new and continuing grants.

Both of these matters were eventually resolved, but only after months of Congressional-OMB confrontation and further Congressional action.

To avoid such problems in the future, will it be your intent, Mr. Miller, to follow the clear intent of Congress -- as prepared in the legislative history -- when spending designated, appropriated funds?

If it is clear to me from the legislative history that Congress meant for the executive to have no discretion with respect to such spending decisions, I will of course follow that mandate.

SENATOR DURENBERGER

1. There are two problems with the existing OMB regulatory review process that I would like to raise with you this morning. One is the problem of timeliness of reviews. The other is the problem of off-the-record contracts between OMB and private parties.

   As you know, some people have accused OMB of "off the record" dealings with regulated industries. That bothers me. It's certainly not in keeping with laws governing agency contacts. It's my view that the best way to be sure that regulatory reform is directed toward the broader public interest is to carry it out in the bright sunshine where the President, Congress, and the public can all participate on a level playing field.

   Other people -- myself included -- have locked horns with OMB on the timeliness of its reviews.

   I know that OMB says that agencies don't have to "conform" to its views, only to "respond" to them. But, when OMB drafts the process out endlessly, response turns into conformance because the rules don't get out.

   Let me return to the example that you and I were talking about the other day: EPA's rules governing maximum levels of contaminants allowed to go into public drinking water. For six months OMB has held up the publication of these standards -- four months longer than OMB's own review process allows.

   OMB was taking so long responding that the Chairman of the Environment and Public Works Committee, Senator Stafford, the ranking member, Senator Bentsen, Senator Baucus and I wrote a letter to OMB objecting to the delay. That was in August. OMB didn't answer us. We wrote again in September. OMB didn't answer us. We wrote to Lee Thomas. But, we got no answer.

   It's this kind of behavior at OMB that backs Congress into a corner. So last Friday the Senate attached an amendment to the superfund bill to prod EPA into action. That's not the way I'd like to do it, but what choice does OMB give us?

   Unfortunately, environmental regulations aren't the only examples. Nor are the problems with OMB limited to agency rulemaking. The Paperwork Act may also have been a vehicle for abuse. One example which my subcommittee is now involved in is HUD's effort to collect data on the racial, gender, and ethnic background of those who benefit or are intended to benefit from its programs. HUD has been trying to get OMB's OK on these forms for over a year. The situation is so ominous that Senators Chiles, Mathias, and I asked GAO to investigate it.

When we passed the Paperwork Act we never intended it to be a blanket under which OMB could hide whenever it wanted to change the law without benefit of an enabling statute.

These examples are symptoms of a larger problem. OMB may be using its procedural authorities to redirect policies. Now I know that we give bureaucracies a lot of discretion. But when OMB takes advantage of this discretion in ways that appear to be abuse, Congress reacts. At first it was a minor stream of dissatisfaction coming from the House side. But now that stream is a river. It's on the Senate side too, and the concern is bipartisan.

When Congress has to hold a hearing, or worse, go to court to get the simplest demonstration OK'd, to get information collected or released, or to get a rule published in the Federal Register, then we have more than a disagreement over policy. We have a disagreement over the role of institutions.

I'm hoping that your arrival at OMB signals an improvement in this situation. You have an opportunity to make three changes which I think would go a long way toward saving the regulatory review process that we both agree is vitally important:

1. First, you could allow agencies to make the content of their proposed rules public at the same time they are submitted to OMB. This would provide a public benchmark against which to gauge any changes which occur as the result of OMB review.

2. Second, you could require OIRA to log all of its contracts with outside parties. This would go a long way to ensuring the public that the process is not working like a political filter.

3. Third, you have an opportunity to appoint a new Director for OIRA. You could use this appointment to send a signal to Congress and the agencies that OIRA is interested in working with them to promote regulatory reform. Right now, there are many up here and the agencies who see OMB as a black hole -- interested less in improving the efficiency and effectiveness of regulations than in preventing agencies from regulating at all.

What I'd like to hear from you today -- as one who hopes to see this OMB process survive -- is how you plan to deal with these problems and if you plan to make any of these changes?

In answer to your first question, as I indicated during the hearing, I favor enactment of the Paperwork Reduction Act amendments -- also the appropriations language -- requiring OMB to make public preliminary drafts of agency rules (proposed or final) and correspondence between OMB and the agency after the rule (proposed or final) has been published in the Federal Register. I think this would provide ample opportunity for Congress to exercise its oversight function and at the same time retain some necessary protections for the deliberative process.

In answer to your second question, I agree with the sentiments you express, and as I said at the hearing I am very sympathetic to the notion you posit. However, I would prefer inquiring into the feasibility of such program before giving a definitive answer. Perhaps during a presentation before your subcommittee later this year -- as I agreed during the hearing -- would be the appropriate time to explore this possibility.

As for your third question, I hope that you will be pleased with my appointment of a new director for OIRA. This person will understand clearly the need for communications with Congress and also the need to improve the regulatory process along the lines you indicate.

2. When Dave Stockman applied for the job of budget director four years ago, he spelled out beforehand what he proposed to do in the job -- in detail. In fact, we all read about it in a 23 page memo he wrote to the President.

   Most of the detail boiled down to one basic theme: the country is on the brink of a deficit crisis so great that he linked it to an "Economic Dunkirk."

   For the last four years, we've been engaged in hand-to-hand combat, trying to whittle the deficit down to size. Nobody could have fought harder in this effort than Dave Stockman did. But some people think -- and I'm beginning to be one of them -- that the battle has been lost. After all, it took us one hundred and ninety years, two world wars, a great depression, an oil crisis, and two police actions to get our first trillion dollar debt. It only took us four years to raise our second trillion!

   And now I read in Fortune that Dave Stockman thinks we just missed our last chance to get control of the deficit. And I quote, "He foresees prolonged volatility in the financial markets as the Federal Reserve navigates the perilous strait between recession and inflation. The turbulence cause by heavy government borrowing, he thinks, will ultimately force the Fed to err on one side or the other. The outcome, Stockman told Fortune will be severe economic and political trauma."

   In April before the Association of Private Enterprise Education you said and I quote: "Much of the current hand wringing over the federal deficit reflects the old government-centered thinking -- the outlook repudiated in the polls in 1980 and again last November."

   Am I to assume that this means that you think Dave Stockman is one of these hand wringers and that we don't need to concern ourselves about the deficit? And, if that's not the case, then can you be as specific as he was about precisely where you would like to make further cuts in federal spending?

I agree with Dave Stockman that we need to be very concerned about the deficit. On the other hand, as I indicated during the hearing, I am also concerned that we not be panicked into precipitous action that would mean long-term problems for the economy as a whole. I see the task before us in eliminating the deficit as long and arduous -- one for which there are no easy, quick fixes. (My reference to "the old government-centered thinking" went to notions previously in vogue that government could solve all macroeconomic problems -- for example, could stabilize economic fluctuations by fine-tuning fiscal policy -- without having adverse consequences on incentives and therefore on the economy's overall performance.)

3. In your testimony this morning you stated that the average turnaround time for the review process was 9 days (during your tenure at OIRA). Several days ago, however, I joined Senator Stafford and others in amending the Superfund legislation to require EPA to promulgate standards for the maximum level of carcinogenic contaminants in public drinking water. We did this reluctantly because OMB had delayed the promulgation of this rule for months. I would like to know if the drinking water example is the exception of the rule.

Let me note for the record that I do not know the details of the OMB review to which you point. Let me say, however, that based on your description it would appear that this review was clearly an exception to what I would consider an appropriate response framework.

4. In order for my subcommittee to fulfill its oversight responsibilities it is important for us to obtain complete data on the average turnaround times for agency rules submitted to OMB for review. We would like data on the overall distribution of turnaround time, plus breakdowns by agencies and types of rules.

The attached table, "Review of Rules under Executive Order No. 12291", gives review times by OMB for major and non-major rules by agency.

REVIEW OF RULES UNDER EXECUTIVE ORDER NO. 12291

Average Review Time
February 1981-June 1985

Agency	Major Rules		Non-Major Rules		All Rules	
	Rules	Avg Rev	Rules	Avg Rev	Rules	Avg Rev
USDA	94	17	2523	13	2617	13
DOC	13	36	588	11	601	12
DOD	0	0	44	16	44	16
DoED	4	35	355	15	359	15
DOE	8	31	165	8	173	9
HHS	24	27	966	22	990	22
HUD	32	3	460	16	492	15
DOI	32	10	831	14	863	14
DOJ	0	0	269	10	269	10
DOL	18	55	199	24	217	27
State	1	29	32	10	33	11
DOT	31	42	1046	16	1077	17
Treasury	4	25	175	13	179	13
EPA	33	55	1770	19	1803	20
Other Agencies	34	25	1555	15	1589	15
TOTAL	328	26	10978	16	11306	16

5. The last five years have witnessed dramatic changes in the makeup of the federal budget. Despite our deficit problem, some areas of the budget have done surprisingly well. Others have been hit hard by the budget axe. For example:

** Between 1981 and 1984, defense expenditures increased 43% in current dollars, 20% in constant dollars, and 23% as a proportion of all federal expenditures.

** During this same period, entitlements grew by 24% in current dollars and 8% in constant dollars.

** Meanwhile, federal aid to state and local governments was being cut more deeply than any other segment of federal spending. It was down 25% in the number of programs, down 9% in constant dollars, down 15% as a percent of GNP, down 21% as a proportion of the federal budget, and down 20% as a proportion of state and local spending.

** More recently, this trend has been continuing and expanding. This year's budget resolution contemplates eliminating General Revenue Sharing after FY 1986 and substantially reducing CDBG, UDAG, mass transit grants, and other intergovernmental programs. At the same time, the federal government is currently in the process of imposing new costs on state and local governments by including their employees in the medicare system and subjecting them to FLSA requirements. At the same time, the Treasury's tax plan would make it more difficult for states and localities to raise revenues on their own.

Therefore, I would like to know how you feel about these developments. In your view, have we gone far enough in cutting back federal aid to state and local governments relative to other sectors of the budget, or do you favor proposals for further actions in this area? If so, I would like you to detail them.

I concur in the overall budget priorities established by the President, as reflected in his fiscal year 1986 budget. That is: a continuing strengthening of our defense posture, protection of specific entitlements programs, and meaningful progress in reducing the budget deficit. Obviously, further budget austerity for certain discretionary spending programs -- including transfers to state and local governments -- was called for. Whether or not the cuts contemplated in the fiscal 1986 budget are sufficient is a matter on which I would be reluctant to comment without knowing all of the details and more clearly having in mind the President's budget priorities for the coming fiscal year.

SENATOR CHILES

1. One arena of regulatory reform I and Senator Danforth have had an interest in during the past three years is the area of federally sponsored research. I have become increasingly convinced that how the federal relationship with our nation's universities and colleges is conceptualized and what administrative requirements are chosen to regulate this relationship has a profound impact on research productivity. As you know, those dollars to basic research fuel the nation's engine for new technology and are an important factor in growth and our ability to compete internationally.

   Recently, the National Academy of Sciences' Government-University-Industry Research Roundtable began to encourage a demonstration in the State of Florida to simplify and restructure the federal relationship with the major research institutions in Florida. The effort will build upon a national experiment undertaken by the National Science Foundation; the Departments of Energy, Agriculture, and Health and Human Services; the National Institute of Health; and the Office of Naval Research. A major proportion of federal research dollars used by Florida's institutions will be involved in this project.

   We in Florida are very excited over the prospects for this project. If successful, the approach will result in enhanced research productivity, a reduction in administrative costs, fewer paperwork and regulatory costs, and better accountability for federal funds.

   At some point in the near future, would you take a look at this Florida experience? I would like to hear from you whether this is a regulatory and management reform that should be extended to the entire nation. If so, there is an important role for the Office of Management and Budget to perform.

As former head of the Office of Information and Regulatory Affairs (OIRA), I am deeply interested in pursuing any idea that could potentially reduce the regulatory burden at the Federal or State level.

I would be happy to examine and evaluate the Florida proposal and report to you on its feasibility.

2. The Committee on Governmental Affairs passed legislation last Congress to reauthorize the Paperwork Reduction Act. It did not pass the full Senate.

   The bill contained amendments which enhanced the sunshine aspects of the law, clarified and expanded the public participation requirements and created an information technology fund. Do you support reauthorization of the Paperwork Reduction Act? Would you support a bill similar to the one this Committee passed last Congress?

   Yes, as indicated during the hearing, I support reauthorization under the Paperwork Reduction Act along the lines of the bill the Committee approved last Congress. I would anticipate working with the Committee to secure its passage.

3. The head of the Office of Information and Regulatory Affairs is now vacant. What kind of professional and political qualifications should the person who heads this office have?

   In your mind how important is it that the Administrator have some background in the information fields of telecommunications, automatic data processing, statistics, and records management?

   How soon do you anticipate a new Administrator will be selected?

   I anticipate filling the position of Administrator for Information and Regulatory Affairs with a professional of the highest caliber and integrity. I would anticipate this person's communicating a great deal with Congress and therefore it is necessary that he or she have requisite political skills. In terms of specific background with respect to information, I do believe it is important that this person have a quantitative orientation -- that is, be good with numbers and statistics, and have a familiarity with automatic data processing. However, I would not want to limit my choice to those candidates having extensive experience in those particular fields. Finally, I would anticipate appointing a new Administrator immediately upon taking office.

4. I hear charges that the Paperwork Act is being used to "deregulate" federal programs. While the Act was intended as a regulatory reform measure, I never envisioned the Act as a keystone to "deregulation" of government. I make a distinction I would like to respond to. I see "deregulation" as a process over whether or not there should be a federal role in some activity. I see "regulatory reform" as a process over improving how government should select the most appropriate role once Congress has determined there shall be one. The Paperwork Act creates an accountability structure to improve decisions over the latter set of concerns, not the former. Would you comment on that point of view?

Semantics aside, I agree generally with the proposition implied in your question -- that is, most of the work in the regulatory area performed by the Office of Information and Regulatory Affairs is over how best to carry out the regulatory mandates established by Congress. It is seldom that OIRA is faced with the question of whether there should be a federal presence in a particular area. (That is, as you point out, Congress seldom grants regulators total discretion whether to regulate an area, instead giving it discretion to chose the best means of securing the mandated regulatory objectives.)

On the question of semantics, the President's original choice of the term "Regulatory Relief" was meant to encompass actions by the Executive Branch to eliminate burdensome regulations that were not mandated by law, and also to secure modifications in existing rules and the promulgation of new ones that would meet the test of securing the legitimate goals of regulation at the lowest possible cost -- thus "relieving" the society of the excessive costs of regulation.

Senator **Durenberger** [presiding]. A number of organizations have requested to testify today, in connection with Mr. Miller's confirmation. They have all been invited to submit written testimony, which will be placed in the record. I ask that each of the witnesses able to testify here today summarize the testimony and limit the oral testimony to 5 minutes.

We expect to have several more people here, but we will begin with Mr. Patrick J. Nilan, the director of legislation, the American Postal Workers Union, AFL-CIO, and a great Minnesotan. Patrick?

TESTIMONY OF PATRICK J. NILAN, DIRECTOR OF LEGISLATION, AND ROY BRAUNSTEIN, LEGISLATIVE AIDE, AMERICAN POSTAL WORKERS UNION, AFL-CIO; GEORGE GOULD, NATIONAL DIRECTOR, NATIONAL ASSOCIATION OF LETTER CARRIERS; AND EMMETT GOOD, LEGISLATIVE CHAIRMAN, AND FRANK L. MIKLOZEK, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF POSTMASTERS

Mr. **Nilan**. Thank you, Mr. Chairman. As a fellow Minnesotan, it was always a pleasure to testify before a committee on which a Senator from my State, Minnesota, appears.

I will be happy to cooperate with the committee, and our entire statement will be presented for the record.

First, we want to thank Senator Stevens, your colleagues, and Senator Eagleton, as well as yourself and Mark Andrews from North Dakota, who submitted a statement questioning the OMB designate's position on the private express statutes, and also, I believe, Senator Burdick of North Dakota submitted a statement for the record, and perhaps several other Members of Congress.

To my right I have Mr. Roy Braunstein, who is our legislative aide and works very closely with me on the legislation.

I want to also say that our president, Moe Biller, would have been here today to present the formal testimony of the union, but because of certain holidays and other commitments, was unable to be here and regrets it very much.

Mr. Chairman, we are appearing in regard to the nomination of James C. Miller III to be the new Director of the Office of Management and Budget. I will paraphrase the statement.

Postal workers and Federal workers and retirees are very aware of the power and importance of the Cabient level position of the Director of the Office of Management and Budget.

Frankly, we have been forced to be aware of that position by the constant stream of punishing proposals that have been aimed at us and have been approved by that Office.

We do appreciate that the Congress did not follow through on some of the very devastating recommendations adversely affecting retirement and employee workman's compensation, health benefits and many other programs which the Congress responded to our objectives and supported equity and justice for all Federal postal workers.

I won't go into the mechanics of it, because I am sure everyone is familiar with the problems we had with the former Director of the

Office of Management and Budget, and of course, Mr. Grace, who Senator Eagleton questioned the designate about, and his continuing efforts to cause, in our opinion, many problems for the Government and the country at large.

However, our main concern at this point is Mr. Miller's strong position advocating repeal, not amending, not modification, but repeal of the private express statutes and the first class mail monopoly of the U.S. Postal Service.

This is not a new proposal, by the way. Back in the days when we also discovered that such simplistic solutions as "Dr. Johnson's Miracle Tonic" didn't cure illnesses, we also recognized unequivocally the universal postal service at uniform rates, in our opinion, cannot be left to the private sector.

Frankly, many Senators and Members of the Congress on both sides of the aisle, Republicans as well as Democrats, historically and traditionally over the years, when this ugly proposal comes before the Congress, have repeatedly denied any such legislation or any serious consideration thereof.

That includes some members of this committee, as well as Senators who are no longer in the Congress. Among those who still are, I mention Senator Mark Andrews; former Majority Leader Howard Baker; Senator Quentin Burdick from North Dakota; Senator Lawton Chiles; Senator Dennis DeConcini; Senator Barry Goldwater; Senator Nancy Kassebaum; Senator Charles Mathias; Senator George Mitchell; Senator Dave Pryor; Senator Tom Eagleton; Senator Ted Stevens, particularly, and also Senator Edward Zorinsky from Nebraska.

It is interesting, Mr. Chairman, to note that the question of retention of the private express statutes is not a bipartisan or political issue. Again, we have been very gratified by the support which the Congress has given to the retention of those statutes.

On pages 4, page 5, page 6 and page 7, as well as page 8, we quote from excerpts of testimony given by these prominent Members of the U.S. Senate in opposition to any repeal or modification of the private express statutes. Oddly enough, these go back to the same period of time when Mr. Miller was aggressively recommending that the private express statutes be repealed, those Members of the U.S. Senate opposed it at hearings which took place, I believe, in 1982.

So obviously, Mr. Miller has not and does not subscribe to, if I may quote from the Constitution, "self-evident truths" which Members of the Senate, as well as many Members of the House, have supported in opposition to Mr. Miller's position particularly in recent years.

As a matter of fact, Mr. Chairman, I was a little confused with Mr. Miller's responses to the questions that were raised by both Senator Stevens, particularly, and also Senator Eagleton on this subject. We hope the record will be clarified by Mr. Miller at a later point.

Mr. Chairman, we conclude our statement by suggesting to this committee and I am sure they will, carefully review the OMB designate's statements and his response to questions on this subject.

In conclusion, we further recommend that the committee not hesitate to reject this nomination if, in your judgment, Mr. Miller, as Director of OMB, will continue to allow ideological diversions get in the way of performing a responsible, equitable, and fair administration of OMB.

Thank you, Mr. Chairman.

Senator **Durenberger**. Thank you, very much.

Let me say, Mr. Gould and Mr. Good, your statements will be placed in the record. Please summarize. Mr. Gould, 5 minutes. Thank you.

Mr. **Gould**. Mr. Chairman, my name is George Gould. I am the director of Legislation for the National Association of Letter Carriers. Mr. Sombrotto could not be here at this time because of a schedule conflict. Besides our full statement, I would also like to submit for the record a letter signed by the Rural Letter Carriers, the National Association of Postmasters, the National League of Postmasters and the National Association of Postal Supervisors and the president of our association.

Senator **Durenberger**. It will be made part of the record.

Mr. **Gould**. Mr. Miller advocates deregulating the limited first-class mail monopoly of the Postal Service. He cites the break-up of AT&T as a good model to emulate. I see his point. If he likes five-page telephone bills, rising prices and diminished service, he will love breaking up the Postal Service.

However, I do not think we should sacrifice inexpensive, universal mail service for the sake of individual ideology. Both the Senate and the House have repeatedly rejected similar, ill-advised proposals.

Private attempts at mail delivery are not new. In the 1880's, when private express companies were allowed to move the mail, they quickly grabbed only profitable routes within or between urban areas. The resulting imbalance left primarily rural, expensive routes to the Postal Service, while private groups skimmed the cream off the top. The monetary effects on the public mail system were disastrous, and chaos ensued when many of the private companies failed.

Advocates of changing the monopoly would repeat this error. Since private mail systems will have no responsibility to the public, they have no greater duty than increasing their own profits. They boast that they will be there only for the money.

Maybe they could deliver letters for 22 cents between Washington and other large east coast cities, but I have yet to hear of a private carrier offering to deliver mail from Medina, OH to Mountain Village, AK for 22 cents, or from Bath, ME to Tupelo, MS.

Yet the Postal Service does it for 22 cents, 6 days a week. That is hardly an exhorbitant cost for such service.

Here is an illustration of how one private operation works. Recently, University of Arizona officials found 54 boxes of year-old, first-class mail in a storage locker. The private carrier which had handled the mail went bankrupt and simply deserted the mail. When contacted, the company officials disavowed any responsibility for the tragedy. After all, he claimed, they were only in the business for profit.

The U.S. Postal Service also protects the mails. No similar safeguards protect the privately carried mail.

Congressional and legal actions throughout the years have supported the postal monopoly in the interest of preserving vital communications throughout the entire country. Because Miller's position will divert business to private mail services, it will result in the death of the universal postal service and postal rates which America now enjoy. It wrecks the economy of scale necessary for a cheap, efficient postal service.

In fiscal year 1984, over 39,000 postal facilities processed 132 billion pieces of mail, more than all other countries' postal services combined. This volume helps us maintain a financially healthy Postal Service.

I would assume any knowledgeable Budget Director would be overjoyed with such news, but not Mr. Miller.

The huge scale of postal work, however, does not detract from efficiency. Gross productivity increased for the 10th consecutive year, as the amount of mail processed per full-time employee rose to an all-time high, far more than any other postal system. Nationwide performance for overnight delivery of local mail is 95 percent. Our system is universally regarded as the most efficient, most cost-effective mail service in the free world.

I would assume any Budget Director would broadcast this around the world, but not Mr. Miller.

His proposal will result in either higher taxes from the general public in order to pay the burden of keeping the more costly routes or forced cutbacks in delivery, particularly to small towns.

What would be the economic impact of deregulation? A loss of jobs and probably closure of many rural and urban postal systems.

One final note. We get more than postal service from post offices. Draft registration, food stamp distribution, and displaying of FBI most wanted posters are just some of the other functions. Often, when Congress needs something distributed, it immediately enters and uses the post office.

In summary, privatizing the mail service will not improve it. Being forced to rely on private carriers is like playing Russian roulette with personal correspondence, bills, and financial transactions.

United Parcel Service, for example, boasted its service, but when they ran into difficulties, they refused to continue to deliver in Alaska.

As long as there are private express statues, the Postal Service can provide efficient, experienced service for all Americans, at all locations in all walks of life across the country.

If Mr. Miller persists in his desire to change the private express statutes, the NALC will oppose his nomination. I would like to apprise him of the old American adage, "If it ain't broke, don't fix it."

Thank you, and we will be glad to answer any questions.

Senator **Durenberger**. Thank you, Mr. Gould.

Mr. Good?

Mr. **Good**. Mr. Chairman, members of the committee, my name is Emmett Good. I am the Postmaster of Stanley, VA. I am chairman of the National Association of Postmasters' Legislative Committee. Today, I am appearing on behalf of the National Association of Postmasters of the United States. Appearing with me is Frank L. Miklozek, executive director of our organization.

We want to thank you for this opportunity to testify on behalf of the Nation's 29,700 postmasters regarding the important matter of confirmation of James C. Miller III as Director of the Budget for the Office of Management and Budget.

The reason for our wanting to testify on this very important hearing is that Mr. Miller, a few weeks ago, wrote an article published in the CATO Journal, in which he advocated the repeal of the U.S. Postal Service's letter mail monopoly.

Ordinarily, our organization would not question the appointment to this or a similar position by the President of the United States, since we fully recognize that this is one of the President's prerogatives to nominate a member of his party to such a position.

Mr. Miller's statement, however, goes to the very heart of the U.S. Postal Service system and the first-class monopoly which is necessary to ensure that all American families, urban and rural, low and high in income, receive the same level of service at the same cost.

I might add that this is the very heart of what is in the best interests of the American people. If his recommendation were carried out, it would undermine the universality of the Postal Service.

Because of the impact that his recommendation had on the U.S. Postal Service, we respectfully request that he be questioned in this regard fully and that you satisfy yourselves as to how well he is informed on how our universal system of mail operates and if he realizes what the full impact on the U.S. postal system would be if his recommendations were followed.

If, after doing so, you are not fully satisfied with his answer or it is apparent that if his appointment is confirmed he is determined to persist in his efforts to repeal the private express statutes, then as the representatives of some 39,000 postmasters, we recommend to the Senate that it not confirm the appointment.

Thank you, Mr. Chairman and members of the committee, for having provided this opportunity for us to express the views of the National Association of Postmasters of the United States. If you have any questions, we will be glad to try to answer them.

Senator DURENBERGER. Maybe just one. Mr. Good, since you closed on that note, perhaps you could respond.

To be persistant with the CATO news, how is he going to destroy the current first-class universal mail system without help from the people around here?

Mr. NILAN. There is one possible way, of course, which has been tried by the administration for the last 4 or 5 years, and that is to completely eliminate the public service subsidy for your nonprofit and small publication mailings. It would not destroy the system, but it is an indication of great concern and also by proposing legislation on behalf of the administration to repeal the statutes.

Senator DURENBERGER. Beyond that? I guess I don't agree with that.

Mr. GOULD. Earlier in testimony, Senator Stevens asked him if the elimination of the private express statutes was on his agenda. He indicated it was on his agenda, even though it was low priority.

The Senator then pushed him to say that he thought the OMB was very active in the deregulation of the airlines and led them to believe that the airlines would still serve rural areas. When that no longer became profitable, then they helped push through legislation to eliminate that alternative.

The Senator's concern is ours, and that is as the head of OMB, he is in the position of suggesting and pushing and encouraging legislation to change the private express statutes.

Second, there are certainty regulatory changes that can be made to title 39 and to title 18 that would weaken the private express statutes, thereby making them more difficult to enforce, and giving critics a greater opportunity to repeal them.

Senator DURENBERGER. Say that again? There is something he can do under what and what?

Mr. GOULD. Under regulations.

Senator DURENBERGER. Which would destroy?

Mr. GOULD. Under the regulations, the enforcement procedures that are used to enforce the private express statutes by the Postal Service can be weakened by administrative change, and it has been done. Before I went to work with the letter carriers, I was on the staff at the Post Office Committee. Through recommendations under the Carter administration and the Postal Service management at that time, they put changes into regulatory procedures that would weaken the private express statutes without changing the law.

Senator DURENBERGER. OK.

Mr. Good?

Mr. GOOD. I might add also that in the foundation report which has been the battle for some people here in Washington, there is also an example that the very thing that George has said can be done in the Attorney General's office, such as by limiting the scope of what the private express statutes really cover, and the example they gave was that what about just making them applicable to handwritten letters?

Senator DURENBERGER. That can be done, you say, without any kind of legislative involvement? And we would be prohibited, in effect, from negating any of those regulations?

Mr. GOOD. I don't think that you would be prevented from doing anything. He would simply introduce a bill that would probably kill these things. The fact that that takes legislative action is a process we would rather not see happen.

Mr. NILAN. This is a very controversial area, because in recent years, as was pointed out, the Board of Governors, the Postal Rate Commission and the Postmaster General have continually been concerned about the interpretation of the private express statutes as related to certain types of printed copy, and other aspects of the first-class letter mail privilege. That is the door we are talking about that, by relaxation or modification of the statutes, you could take billions of pieces of what we consider first-class letter mail away from the Postal Service and they are weakened.

Senator DURENBERGER. Maybe you can pin that down. If you know something we don't know, then provide us with that.

Mr NILAN. I would be happy to provide you with information. If I may, Mr. Chairman, Senator Mark Andrews, in the statement he submitted to the record,[1] referred, I believe, to some of the editorials going on out in North Dakota on this issue concerning the nomination of Mr. Miller. I would like to ask that the record include news reports from two newspaper articles be included, one from a Bismarck, ND paper and one from Wisconsin.

Senator **Durenberger**. We will include those articles in the record.

Thank you, gentlemen, very much.

Mr. **Gould**. Thank you.

Mr. **Good**. Thank you.

[The prepared statement of Mr. Nilan and editorials, the prepared statement of Mr. Sombrotto and a letter submitted by Mr. Gould, and the prepared statement of Mr. Good follow:]

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[1] See p. 281

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Eastern Region

Neal Vaccaro
Northeastern Region

Archie Salisbury
Southern Region

Testimony of

Patrick J. Nilan

Legislative Director

American Postal Workers Union, AFL-CIO

on the

Nomination of James C. Miller III

to be

Director of the Office of Management and Budget

before the

Committee on Governmental Affairs

United States Senate

September 24, 1985

Statement of Patrick J. Nilan
Legislative Director, American Postal Workers Union, AFL-CIO

Mr. Chairman and Members of the Committee, I am Patrick J. Nilan, Legislative Director of the American Postal Workers Union, AFL-CIO. I am accompanied by APWU Legislative Aide Roy Braunstein. I want to thank you on behalf of the 325,000 members of the American Postal Workers Union for the opportunity to present our views on the nomination by President Reagan of James C. Miller III to be the new Director of the Office of Management and Budget.

Postal and federal workers and retirees are very aware of the power and importance of the cabinet level post of the Director of the Office of Management and Budget. We've been forced to be aware of that position by the constant stream of punishing proposals that have been aimed at us and have been approved by that office.

These proposals were intended to punish and make scape goats of postal and federal workers and retirees by cutting their pay and benefits while at the same time being used to finance a wasteful defense buildup and tax cuts intended to benefit the wealthy.

We are pleased that some of the more radical proposals have been turned back by the Congress. Nevertheless, we believe that serious damage has been inflicted by all the propaganda and the cuts that have been taken out of the pockets of government workers.

Up to this point, most of the specific propaganda and attacks were left to highly visible appointees of this Administration such as Donald Devine, former Director of the Office of Personnel Management and W.R. Grace, former head of the so-called Grace Commission. That is why we are very concerned that this Administration has now nominated an individual for the cabinet level position of Director of the Office of Management and Budget who appears more interested in pursuing a radical ideology than improving the functioning of government--the "management" part of the OMB Director's job--and reducing the deficit in a responsible manner-- the "budget" part of the Director's job.

A prime example of our concern is that one of Mr. Miller's favorite hobbies is advocating repeal of the limited first-class mail monopoly of the United States Postal Service, known commonly as the Private Express Statutes.

This proposal is not a new idea. It has been a standard item in the radical bag of tricks of those who believe that the ideal of a free market can be used everywhere to cure any problem; real or imagined. Back in the days when we also discovered that such simplistic solutions as "Doc Johnson's Miracle Tonic" didn't cure illnesses, we also recognized unequivocably that a universal postal service, at uniform rates, could not be left to the private sector.

Mr. Miller's proposal is not a mainstream or new idea. It would result in a sharp reduction in service to rural areas, closure of many rural post offices, and greatly increased postal rates, especially in costly and hard to serve rural and inner city areas.

Many Senators and Representatives have written and testified against repeal of the Private Express Statutes. Opposition has come from the mainstream of politics, representing both liberal and conservative thought, including Republicans and Democrats alike, and many members of this committee.

In Joint Economic Committee hearings held three years ago a bipartisan group of United States Senators including Senators Mark Andrews, Howard Baker, Quentin Burdick, Lawton Chiles, Dennis DeConcini, Barry Goldwater, Nancy Kassebaum, Charles Mathias, George Mitchell, David Pryor, Donald Riegle, Ted Stevens, and Edward Zorinsky presented testimony strongly in favor of retaining the United States Postal Service Private Express Statutes.

That is a very diverse, prestigious and bipartisan collection of supporters, and is just a sample of the many members of both the House and Senate who have rejected proposals to repeal the statutes over the years. Their comments provide strong arguments of why we have a universal postal service and why we should never see the postal service turned over to private sector profiteers to the detriment of all the citizens of our great nation.

Senators Ted Stevens, Charles Mathias and David Pryor made these comments:

> "The ... Private Express Statutes ... (are) ... the cornerstone on which our Postal Service depends. Its existence allows us to make available to all Americans throughout this vast country an economical and viable method of communicating with one another.
>
> "From the beginning, these statutes have been a central part of the Nation's postal laws. They are a direct descendant of an act approved by the founders of this country in 1782 in the Continental Congress. These statutes, which are similar to provisions found in the postal laws of countries throughout the Western World, have stood the test of time. They have needed adjustment only infrequently over the course of the Nation's history, despite the tremendous growth of the country and the vast technological change which has improved the system in generation after generation. The Private Express Statutes have lasted over the years because they do the job which they are designed to do, and no more.

"Universal mail service has been a **great boon to the economy** of this country and has helped to **stimulate business growth...**

"...(W)e cannot have both the security and equity of a universally available Government mail service and require it to split up its present mail volume with competing private systems having more limited aims and responsibilities."

Senators **Stevens, Mathias and Pryor** sum up the impact that repeal would have on the federal budget:

> "The **only way** to even try to offset the effect of siphoning away mail revenue from the postal system would be to **pump large sums of taxpayer money** into the system to make up for revenue losses ... We simply can't afford it."
>
> "The revenue protection which the Private Express Statutes afford is the right way to keep a financially healthy system that can pay its own way, without calling for vast sums from the Treasury."

Stevens, Mathias and Pryor point out that no funds are provided for the public service subsidy that formerly was used to offset the cost to the Postal Service of providing such services as rural delivery.

Senator **Lawton Chiles**, another member of this committee who is also known for his work on the Budget Committee to reduce the federal deficit, provided strong testimony of why he opposes elimination of the Private Express Statutes as Mr. Miller has proposed. Senator **Chiles** also emphasized the potential cost to the federal government in his remarks.

> "We could not hope to continue to pay for a U.S. Postal System going daily into every community and by every home if much of its supporting revenue were to be diverted to selectively competing private carriers."

Selective competition, or "**skimming the cream**" by private mail carriers would be a major consequence of repealing the Private Express Statutes.

Senator **Mark Andrews** described "skimming the cream" when he said "It's quite apparent commercial operators would seek the metropolitan areas, which would be economically attractive, but avoid less populous areas."

Former Senate Majority Leader **Howard Baker** pointed out, in a letter submitted for the record, the effect of "skimming" when he wrote "...economics dictate that private companies would not service unprofitable routes which the Postal Service is bound by law to serve."

Senator Dennis DeConcini stated "... if we were to open mail delivery in this country to competition, the inevitable result would be chaotic, inconsistent, and inadequate mail service." DeConcini added,

> "I doubt that many private companies would be clamoring to deliver the mail between Snowflake, Arizona, population 3,510, and Parker, Arizona, population 2,542, a distance exceeding 300 miles with no connecting interstates. And if a private concern were willing to deliver the mails, what price would rural Americans have to pay for their delivery service?"

Senator Nancy Kassebaum adds "...it is highly unlikely that commercial firms would be willing to maintain adequate service in less-populated rural communities."

Senator Donald Reigle emphasized that "It is almost certain that once private companies have the right to deliver mail, the lucrative, high density, high volume areas will become the province of commercial entities, while the difficult, remote, and primarily rural areas will remain the responsibility of the Postal Service."

Senator **Edward Zorinsky** stated "I am also a strong believer in free enterprise and the value of competition. However, in the case of first-class mail delivery, I do not believe that private contractors could provide cheaper or more efficient mail delivery, especially to the rural communities of the United States."

Senator **George Mitchell** discussed the social aspect of a universal mail service when he stated his opposition to repealing the Private Express Statutes. "In Maine, the lives of many people, primarily elderly folks, revolve around the delivery of the day's mail. In many towns, the local Post Office serves as the center of community life."

Senator **Quentin Burdick** questioned the depth of consideration of those advocating repeal of the statutes: "I do not feel that those who propose this deregulation fully understand the implications of their proposal."

Finally, Senator **Barry Goldwater** said "Until I can be persuaded that elimination of the Private Express Statutes will not destroy or seriously damage one of the country's fundamental and necessary institutions, ... I must oppose the proposed experiment. The burden of proof is on those who would change the private express policy and they have not met it."

Mr. Chairman, just like the distinguished present and former members of the United States Senate, "**We hold these truths to be** self-evident."

Robert L. Hardesty, the Chairman of the Board of Governors of the U. S. Postal Service pointed out that service to rural areas is not the only service in jeopardy by this proposal. Private postal operators, said Mr. Hardesty, "**simply would not bother to deliver mail to high-cost areas**, such as rural America, less densely populated suburbs and poor inner-city neighborhoods... The consequences for the American consumer would be worse, for we would have a balkanized postal service with many delivery systems."

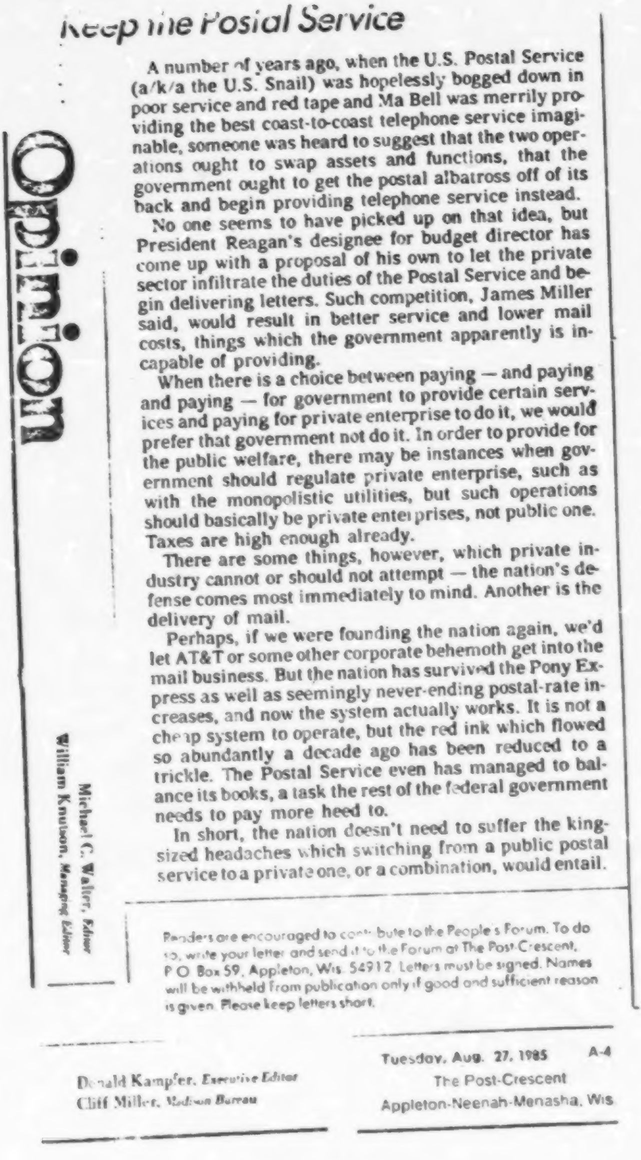
Repeal of the statutes would threaten the integrity of mail service. Who would accept the responsibility for forwarding mail? Who would protect the privacy of the mail? Who would protect the public from fraud and false advertising in the mails? Who would handle foreign mail? Only a national postal service, with the guarantee of integrity from the U.S. government, can be trusted with these public service responsibilities.

Deregulation and decontrol of the basic systems of communication in our country has lead to a serious decline in service in the telephone and airline industries. We don't want to make the same mistake with our national mail service. Certainly we can make improvements in our postal system through better management and careful introduction of system and technological improvements. However it is not necessary to destroy the system we have in order to improve and make progress for the future.

Yet, Mr. Miller has proposed to do just that. The consequences of Mr. Miller's recommendation would be the death of the universal postal service and postal rates which Americans now enjoy.

We recommend that you consider Mr. Miller's testimony and his responses very carefully. It would not be in this country's interest if, as Director of OMB, Mr. Miller were allowed to pursue his radical ideology at the expense of a carefully considered approach to directing the management and budget of our federal government.

We further recommend that the Committee not hesitate to reject this nomination if, in your judgment, Mr. Miller, as Director of OMB, will continue to allow radical ideological diversions to get in the way of performing a responsible job.



Keep the Postal Service

A number of years ago, when the U.S. Postal Service (a/k/a the U.S. Snail) was hopelessly bogged down in poor service and red tape and Ma Bell was merrily providing the best coast-to-coast telephone service imaginable, someone was heard to suggest that the two operations ought to swap assets and functions, that the government ought to get the postal albatross off of its back and begin providing telephone service instead.

No one seems to have picked up on that idea, but President Reagan's designee for budget director has come up with a proposal of his own to let the private sector infiltrate the duties of the Postal Service and begin delivering letters. Such competition, James Miller said, would result in better service and lower mail costs, things which the government apparently is incapable of providing.

When there is a choice between paying — and paying and paying — for government to provide certain services and paying for private enterprise to do it, we would prefer that government not do it. In order to provide for the public welfare, there may be instances when government should regulate private enterprise, such as with the monopolistic utilities, but such operations should basically be private enterprises, not public one. Taxes are high enough already.

There are some things, however, which private industry cannot or should not attempt — the nation's defense comes most immediately to mind. Another is the delivery of mail.

Perhaps, if we were founding the nation again, we'd let AT&T or some other corporate behemoth get into the mail business. But the nation has survived the Pony Express as well as seemingly never-ending postal-rate increases, and now the system actually works. It is not a cheap system to operate, but the red ink which flowed so abundantly a decade ago has been reduced to a trickle. The Postal Service even has managed to balance its books, a task the rest of the federal government needs to pay more heed to.

In short, the nation doesn't need to suffer the king-sized headaches which switching from a public postal service to a private one, or a combination, would entail.

Readers are encouraged to contribute to the People's Forum. To do so, write your letter and send it to the Forum at The Post-Crescent, P O Box 59, Appleton, Wis. 54912. Letters must be signed. Names will be withheld from publication only if good and sufficient reason is given. Please keep letters short.

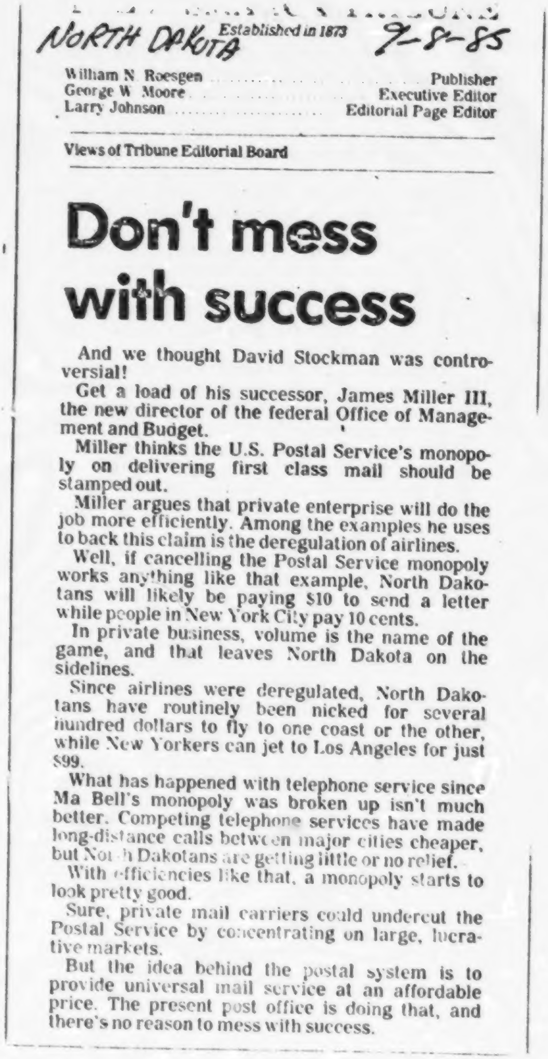
Opinion

Michael C. Walter, *Editor*
William Knutson, *Managing Editor*

Donald Kampfer, *Executive Editor*
Cliff Miller, *Madison Bureau*

Tuesday, Aug. 27, 1985 A-4
The Post-Crescent
Appleton-Neenah-Menasha, Wis

PATRICK J. NILAN
LEGISLATIVE DIRECTOR
AMERICAN POSTAL WORKERS UNION, AFL-CIO
817 - 14TH STREET, N. W.
WASHINGTON, D. C.



NORTH DAKOTA Established in 1873 9-8-85

William N. Roesgen .... Publisher
George W. Moore .... Executive Editor
Larry Johnson .... Editorial Page Editor

Views of Tribune Editorial Board

Don't mess with success

And we thought David Stockman was controversial!

Get a load of his successor, James Miller III, the new director of the federal Office of Management and Budget.

Miller thinks the U.S. Postal Service's monopoly on delivering first class mail should be stamped out.

Miller argues that private enterprise will do the job more efficiently. Among the examples he uses to back this claim is the deregulation of airlines.

Well, if cancelling the Postal Service monopoly works anything like that example, North Dakotans will likely be paying $10 to send a letter while people in New York City pay 10 cents.

In private business, volume is the name of the game, and that leaves North Dakota on the sidelines.

Since airlines were deregulated, North Dakotans have routinely been nicked for several hundred dollars to fly to one coast or the other, while New Yorkers can jet to Los Angeles for just $99.

What has happened with telephone service since Ma Bell's monopoly was broken up isn't much better. Competing telephone services have made long-distance calls between major cities cheaper, but North Dakotans are getting little or no relief.

With efficiencies like that, a monopoly starts to look pretty good.

Sure, private mail carriers could undercut the Postal Service by concentrating on large, lucrative markets.

But the idea behind the postal system is to provide universal mail service at an affordable price. The present post office is doing that, and there's no reason to mess with success.

PATRICK J. NILAN
LEGISLATIVE DIRECTOR
AMERICAN POSTAL WORKERS UNION, AFL-CIO
817 - 14TH STREET, N. W.
WASHINGTON, D. C.

NATIONAL ASSOCIATION OF LETTER CARRIERS
AFL-CIO

Vincent R. Sombrotto
President

100 Indiana Avenue, N.W.
Washington, D.C. 20001
[illegible]

STATEMENT

OF

VINCENT R. SOMBROTTO, PRESIDENT

NATIONAL ASSOCIATION OF LETTER CARRIERS

[illegible]

[illegible]

ON

[illegible]
[illegible]

CONGRESSIONAL TESTIMONY

Mr. Chairman. My name is Vincent R. Sombrotto, President of the National Association of Letter Carriers, a union which represents over 271,000 active and retired city letter carriers of the United States Postal Service.

I want to thank you for the opportunity to testify on the nomination of James C. Miller III as Director of the Office of Management and Budget. I also have a statement signed by the National Rural Letter Carriers Association, National Association of Postmasters of the United States, National League of Postmasters, National Association of Postal Supervisors and myself, as President of the NALC. I would like to submit that statement for the Record.

Mr. Miller advocates deregulating the limited first-class mail monopoly of the Postal Service. He cites the break-up of AT&T as a good model to emulate. I see his point: if he likes five-page telephone bills, rising prices and diminished service, he'll love breaking-up the Postal Service.

However, I do not think we should sacrifice inexpensive, universal mail service for the sake of individual ideology. Both the Senate and House have repeatedly rejected similar, ill-advised proposals.

Private attempts at mail delivery are not new. In the 1800s, when private express companies were allowed to move mail, they quickly grabbed only the profitable routes within or between urban areas. The resulting imbalance left primarily rural, expensive routes to the Post Office while the private groups skimmed the "cream" off the top. The monetary effects on the

PUBLIC MAIL SYSTEM WERE DISASTROUS, AND CHAOS ENSUED WHEN MANY OF THE PRIVATE COMPANIES FAILED. THAT IS THE REALITY OF THE PONY EXPRESS, NOT THE PICTURE PAINTED BY MILLER WHO SAYS, AND I QUOTE, "PRIVATE ENTERPRISE WILL GET THE MAIL DELIVERED -- JUST AS IT DID IN THE OLD WEST."

ADVOCATES OF CHANGING THE MONOPOLY WOULD REPEAT THIS ERROR. SINCE PRIVATE MAIL SYSTEMS WOULD HAVE NO RESPONSIBILITY TO THE PUBLIC, THEY HAVE NO GREATER DUTY THAN INCREASING THEIR OWN PROFITS; THEY BOAST THAT THEY'RE "ONLY IN IT FOR THE MONEY." THEY DO IT BY TAKING THE EASIEST, MOST PROFITABLE ROUTES.

MAYBE THEY COULD DELIVER LETTERS FOR TWENTY-TWO CENTS BETWEEN WASHINGTON AND OTHER LARGE, EAST COAST CITIES. BUT I HAVE YET TO HEAR OF A PRIVATE CARRIER OFFERING TO DELIVER MAIL FROM MEDINA, OHIO TO MOUNTAIN VILLAGE, ALASKA FOR TWENTY-TWO CENTS, OR FROM BATH, MAINE TO TUPELO, MISSISSIPPI. AND YOU CAN FORGET SIX-DAY DELIVERY OR EVEN THREE-DAY DELIVERY TO RURAL MINNESOTA.

MILLER'S POSITION LEGALIZES AND MAGNIFIES THAT DILEMMA. YET THE POSTAL SERVICE DOES IT FOR TWENTY-TWO CENTS, SIX DAYS A WEEK. THAT'S HARDLY AN EXORBITANT COST FOR SUCH SERVICE! IN FACT, IT'S THE CHEAPEST IN THE WORLD. FURTHERMORE, THE POSTAL SERVICE HAS NOT RECEIVED ANY DIRECT SUBSIDY FOR OPERATIONS IN THREE YEARS.

HERE'S AN ILLUSTRATION OF HOW ONE PRIVATE OPERATION WORKED. RECENTLY, UNIVERSITY OF ARIZONA OFFICIALS FOUND 54 BOXES OF YEAR-OLD, FIRST-CLASS MAIL IN A STORAGE LOCKER. IMPORTANT MEDICAL RECORDS, APPLICATIONS FOR GRANTS AND CHECKS WERE AMONG THE LETTERS. THE PRIVATE CARRIER WHICH HAD HANDLED THE MAIL WENT BANKRUPT AND SIMPLY DESERTED THE MAIL. WHEN CONTACTED, COMPANY

OFFICIALS DISAVOWED ANY RESPONSIBILITY FOR THE TRAGEDY -- AFTER ALL, THEY CLAIMED, THEY WERE ONLY IN THE BUSINESS FOR THE PROFITS.

THE POSTAL SERVICE IS NOT GOING BANKRUPT AND WILL NOT ABANDON ITS CUSTOMERS.

WE ALSO PROTECT THE MAILS -- NO SIMILAR SAFEGUARDS PROTECT PRIVATELY CARRIED MAIL. THE STATUTES PROVIDE GOVERNMENT ENFORCED LEGAL SANCTITY FOR MAIL, HELPING TO PROTECT THE AMERICAN PUBLIC FROM MAIL FRAUD, FALSE REPRESENTATION OR TRAGIC INCIDENTS SUCH AS OCCURRED IN ARIZONA. YOUR COMMITTEE AND OTHER CONGRESSIONAL COMMITTEES PROVIDE VALUABLE OVERSIGHT FOR THE POSTAL SERVICE AND PLAY AN IMPORTANT ROLE IN CORRECTING PROBLEMS. SIMILARLY, THE STATUTES PROTECT INTERNATIONAL MAIL AND ENSURE SMOOTH SERVICE WITH OVER 100 FOREIGN COUNTRIES.

SINCE THE EARLIEST DAYS OF OUR COUNTRY, THE PRIVATE EXPRESS STATUTES HAVE BEEN THE CORNERSTONE OF THE POSTAL SYSTEM. THE STATUTES WERE NOT CREATED AT THE BEHEST OF LABOR OR MANAGEMENT, AND EXISTED LONG BEFORE THERE WERE POSTAL UNIONS OR BOARDS OF GOVERNORS. THE CONSTITUTION PROVIDED CONGRESS WITH THE POWER TO "ESTABLISH POST OFFICES AND POST ROADS." THE POSTAL ACT OF 1792 INCLUDED THE EQUIVALENT OF A PRIVATE EXPRESS STATUTE.

CONGRESSIONAL AND LEGAL ACTIONS THROUGHOUT THE YEARS HAVE SUPPORTED THE POSTAL MONOPOLY IN THE INTEREST OF PRESERVING VITAL COMMUNICATIONS THROUGHOUT THE ENTIRE COUNTRY. THE POSTAL REORGANIZATION ACT OF 1970, IN KEEPING WITH THIS LONG, CONSISTENT HISTORY OF GOVERNMENT MONOPOLY OVER THE MAILS, EMPHASIZED THAT THE POSTAL SERVICE SHALL PROVIDE "PROMPT, RELIABLE, AND EFFICIENT SERVICES TO PATRONS IN ALL AREAS" AND TO "ALL COMMUNITIES," A

TASK UNDERTAKEN IN ORDER TO "BIND THE NATION TOGETHER."

BECAUSE MILLER'S POSITION WOULD DIVERT BUSINESS TO PRIVATE MAIL SERVICES, IT WOULD RESULT IN THE DEATH OF THE UNIVERSAL POSTAL SERVICE AND POSTAL RATES WHICH AMERICANS NOW ENJOY. IT WRECKS THE ECONOMY OF SCALE NECESSARY FOR CHEAP, EFFICIENT POSTAL SERVICE. IN FISCAL YEAR 1984, OVER 39,000 POSTAL FACILITIES PROCESSED OVER 131.5 BILLION PIECES OF MAIL -- MORE THAN ALL OTHER COUNTRIES' POSTAL SERVICES COMBINED. THIS VOLUME HELPS US REMAIN FINANCIALLY HEALTHY.

I WOULD ASSUME ANY KNOWLEDGEABLE BUDGET DIRECTOR WOULD BE OVERJOYED WITH SUCH NEWS. BUT NOT MR. MILLER.

THE HUGE SCALE OF POSTAL WORK, HOWEVER, DOES NOT DETRACT FROM EFFICIENCY. GROSS PRODUCTIVITY INCREASED FOR THE TENTH CONSECUTIVE YEAR AS THE AMOUNT OF MAIL PROCESSED PER FULL-TIME WORKER ROSE TO AN ALL-TIME HIGH, FAR MORE THAN ANY OTHER POSTAL SYSTEM. NATIONWIDE DELIVERY PERFORMANCE FOR OVERNIGHT, LOCAL MAIL IS 95%. OUR SYSTEM IS UNIVERSALLY REGARDED AS THE MOST EFFICIENT, MOST COST-EFFECTIVE MAIL SERVICE IN THE FREE WORLD.

I WOULD ASSUME ANY BUDGET DIRECTOR WOULD BROADCAST THAT NEWS AROUND THE WORLD. BUT NOT MR. MILLER.

HIS PROPOSAL WOULD RESULT IN EITHER HIGHER TAXES FROM THE GENERAL PUBLIC IN ORDER TO PAY THE BURDEN OF KEEPING THE MORE COSTLY ROUTES OR FORCE CUT-BACKS IN DELIVERY, PARTICULARLY TO SMALL TOWNS. RURAL AREAS ALREADY SUFFER FROM A MILLER-ESQUE PROPOSAL -- AIRLINE DEREGULATION. RURAL PEOPLE WHO LOST AIRLINE SERVICE ALSO ARE LOSING PROMPT MAIL DELIVERY BECAUSE THE POSTAL SERVICE CAN NOT FIND FLIGHTS INTO THEIR AREA.

Who could possibly want to compound this ill-advised policy under the guise of a "free market" experiment? Mr. Miller does.

What would be the economic impact of deregulation? A loss of jobs and probable closure of many rural and urban postal facilities. We would waste valuable resources: a skilled, experienced and cost-competitive nationwide work force extending to every community; a network of specialized equipment and vehicles; and a system of contracts for mail carriage by air.

No competitive corporation would contemplate such a foolish step. But Mr. Miller does.

The Postal Service also provides extensive mail forwarding and lost letter services. These important functions do not exist among the private carriers.

Mr. Chairman, I do not wish to paint a totally rosy picture. I think there is room for improvement in the Postal Service. This year the Postal Service may run a slight deficit of 1%, the first such deficit in years and it is mainly attributable to increased costs due to airline deregulation, not internal causes.

Also, the new life-style of Americans -- 20-25% of our population moves each year -- presents challenges that letter carriers are committed to overcoming. To meet the challenges of new technology, we are involved in the urgent letter market. It has been a self-sustaining venture and entirely consistent with the Congressional intention that the Postal Service have financial independence.

One final note: we get more than postal service from post offices. Draft registration, food stamp distribution and posting of FBI "Most Wanted" posters are just some of the other functions. Often when Congress needs something distributed, the immediate answer is, "Use the Post Office."

And I would like to add a personal note about letter carriers: each year we save lives. Our "Carrier Alert" program keeps a lookout for elderly, handicapped, homebound and others in trouble. Last year a letter carrier on Long Island saved two children from a burning car. Recently we initiated a missing children program with the Postal Service. You don't get that from any private carrier; they just want to deliver, take the profits and run.

In summary, privatizing mail service will not improve it. Being forced to rely on private carriers is like playing Russian Roulette with personal correspondence, bills and financial transactions. United Parcel Service, for example, boasts that it's the Number 1 hauler of packages, yet it won't deliver to Alaska. Germany and England, yes, but not Alaska. Federal Express will deliver letters there, but for $5 additional cost and only to certain ZIPS.

As long as there are Private Express Statutes, the Postal Service can provide efficient, experienced service for all Americans, in all locations and all walks of life, and the costs of that service can be fairly shared by the entire population.

Governmental monopoly is proper and necessary when the goal is universal mail service at affordable universal rates. Mail delivery in our democracy is a fundamental service provided to

OUR PEOPLE BY THE GOVERNMENT TO ENSURE A NATIONWIDE COMMUNICATIONS NETWORK.

IF MR. MILLER PERSISTS IN HIS DESIRE TO CHANGE THE PRIVATE EXPRESS STATUTES, THE NALC WOULD OPPOSE HIS NOMINATION. I WOULD LIKE TO APPRISE HIM OF AN OLD AMERICAN ADAGE: "IF IT AIN'T BROKE, DON'T FIX IT."

THANK YOU AND I'LL BE GLAD TO ANSWER YOUR QUESTIONS.

National Association
OF LETTER
CARRIERS
Vincent R. Sombrotto
President

Francis J. Conners
Richard P. O'Connell
Halline Overby
Joseph H. Johnson, Jr.
Robert J. Buntz
Anthony B. Morell
Mark Roth
George Davis, Jr.
James G. Souza, Jr.

September 20, 1985

The Honorable Albert Gore, Jr.
United States Senate
Washington, D.C. 20510

Dear Senator Gore:

Recently James Miller III, President's Reagan's choice as OMB director, advocated repealing the Private Express Statutes which give the Postal Service a limited monopoly over first class mail.

Before the nomination is considered by the Governmental Affairs Committee, we would like to set the record straight:

1. The Postal Service delivers to all of the 50 states and Canada for 22 cents. Is that an exorbitant rate? Miller thinks so.

2. Our nationwide delivery performance for overnight, local mail is 95%. Miller thinks that's inefficient.

3. The Postal Service charges uniform rates to everyone, regardless of location. Miller calls this a "subsidy from urban to rural users," implying that rural customers should pay more or get reduced service.

4. Miller cites A.T. & T.'s break-up as a positive example of advantages to his proposal! We agree: if you like five-page telephone bills, rate differences, confusion about service and incomprehensible charges, you'll love deregulated postal service.

5. We protect the mails and guarantee international service. No such safeguard exists with private carriers.

The Private Express Statutes were not created at the behest of labor or management and existed long before there were postal unions or Boards of Governors. They are based in the Constitution and Postal Act of 1792.

Proposals similar to Miller's have failed in Congress before. Recent hearings reaffirmed the folly of Miller's position. But as the President's budget director, he will have considerable influence over the Postal Service.

We urge you to bring this matter up during the confirmation hearings and set Mr. Miller straight: this country has universal postal service at universal rates. We will not forego this democratic service to benefit his ideology.

If you have any further questions, please do not hesitate to contact our organizations.

Sincerely,

Vincent R. Sombrotto
Vincent R. Sombrotto, President
National Association of Letter
Carriers

Tom W. Griffith
Tom W. Giffith, President
National Rural Letter Carriers
Association

Thomas P. Costin, Jr.
Thomas P. Costin, Jr., President
National Association of Post-
masters U.S.

R. Faith Hambright, President
National League of Postmasters

Donald Ledbetter
Donald Ledbetter, President
National Association of Postal
Supervisors

September 24, 1985

STATEMENT OF
EMMETT GOOD
NATIONAL ASSOCIATION OF POSTMASTERS
OF THE UNITED STATES

Mr. Chairman, members of the Committee, my name is Emmett Good. I am the Postmaster of Stanley, Virginia, and I am the Chairman of the NAPUS Legislative Committee. Today I am appearing on behalf of the National Association of Postmasters of the United States. Appearing with me is Frank L. Miklozek, Executive Director of our organization.

We greatly appreciate this opportunity to testify on behalf of the nation's 29,700 Postmasters regarding the important matter of the confirmation of James C. Miller III, as Director of the Budget for the Office of Management of Budget.

The reason for us wanting to testify in this very important appointment is that James C. Miller III a few weeks ago wrote an article published in the CATO Journal, in which he advocated the repeal of the United States Postal Service's letter mail monopoly.

Ordinarily our organization would not question the appointment to this or a similar position by the President of the United States, since we fully recognize that this is one of the President's prerogatives to nominate a member of his party to such a position. This statement, however, goes to the very heart of the United States Postal System and the "first class" monopoly is necessary to ensure that all American communities - urban and rural, low and high income, receive the same level of service at the same cost.

If his recommendation would be carried out it would undermine the universality of the Postal System.

Because of the impact that his recommendation would have on the United States Postal Service, we respectfully request that he be questioned in this regard fully and that you satisfy yourselves as to how well he is informed on how our universal system of mail operates and if he realizes what the full impact on the United States Postal System would be if his recommendation were followed.

If after doing so and you are not fully satisfied with his answer or it is apparent that if his appointment is confirmed he is determined to persist in his efforts to repeal the Private Express Statutes, then as the representative of some 29,700 Postmasters, we recommend that the Senate does not confirm the appointment.

Thank you, Mr. Chairman, and members of the Committee, for having provided this opportunity to express the views of the National Association of Postmasters of the United States. If you have any questions now, my colleague and I will be pleased to respond.

Senator **Durenberger**. Next, we have a financial panel of Mr. Richard H. Fink, president of the Citizens for a Sound Economy, and Joan Claybrook, president of Public Citizen.

TESTIMONY OF RICHARD H. FINK, PRESIDENT, CITIZENS FOR A SOUND ECONOMY; AND JOAN CLAYBROOK, PRESIDENT, PUBLIC CITIZEN

Senator **Durenberger**. Thank you, very much, for appearing before the committee today.

Your written testimony, as I indicated earlier, will be placed in the record. I ask that each of you summarize your testimony in 5 minutes. I would appreciate it. Thank you.

Mr. **Fink**. Mr. Chairman, I am pleased to come before the committee this afternoon in support of the nomination of James C. Miller. As president of a broadly based 200,000-member citizens organization, I appreciate the work Mr. Miller has done as Chairman of the Federal Trade Commission and in his previous position at OMB. I believe he has established a record of which he can be justly proud and one that is appealing to a wide spectrum of Americans.

The crucial topic before us today is the economic welfare of over 230 million Americans. This nomination must be judged by how well it promotes that welfare and how well it serves the goal of bringing about greater abundance in the years ahead.

I believe that it furthers both goals. By far, the most serious economic problem we face is the mounting Federal deficit. This deficit is at the heart of many of our concerns about the Nation's economy. It fuels problems in the realm of international trade, making American jobs less competitive. It consumes investment capital, which could be put to better use fueling job-creating enterprises in the private sector.

It threatens to spur a tax increase, which would drain money from the effort to invest in making American companies competitive in a changing world economy. This deficit sometimes appears to be an intractable problem which can only get worse. But it need not be. Through bipartisan cooperation, and a willingness to reevaluate the role Government plays in our economy, it can be reduced.

I believe Jim Miller has shown he has what it takes to work closely with the President and Congress to develop a solution. The Director of the Office of Management and Budget must be a person of integrity and courage. He must be a creative thinker and a good negotiator. And he must recognize that Government is more often part of the problem than part of the solution.

Jim Miller is such a man. Jim Miller has shown he can handle a tough assignment. As the first economist to head the Federal Trade Commission, he singlehandedly salvaged the Commission from its darkest period. We should remember that frustration with the FTC during the previous administration reached such a point that Congress shut the agency down for a day in 1980, and the Washington Post labeled the Commission America's self-appointed "national nanny."

Jim Miller redirected the FTC with the clearly defined goal of doing what was best for the consumer and what would best sustain job-creating economic growth. He recognized that the Commission was not created to tell businessmen how to run their business. He recognized that a competitive environment is best for stimulating the kind of innovations which will help us move with confidence into the 21st century.

He also recognized that scarce resources can be squandered in needless confrontations between the Government and private sector. This realistic attitude manifested itself in turning an agency which previously had 50 percent of its decisions overturned by the Federal courts into an agency that obtained private sector compliance through cooperation and education.

Jim Miller has also shown strong leadership in his willingness to question the efficacy of many aspects of Government's regulatory role. As the first Administrator of the Office of Information and Regulatory Affairs at OMB, as Executive Director of the Presidential Task Force on Regulatory Relief and as Chairman of the FTC, Miller has been in the forefront of redefining the role of regulatory agencies in a mode consistent with encouraging competition and entrepreneurial creativity. His efforts in this area have saved consumers and taxpayers over $150 billion.

If "by his deeds we shall know him," then few can claim such sterling credentials to oversee the Nation's budget.

Two national elections have demonstrated that the overwhelming majority of Americans want a government that spends less and reduces its interference in their economic affairs. Despite the special pleading we in Washington will always hear from interest groups promoting the agendas of a narrow constituency, Americans have welcomed deregulation and gladly pocketed the savings it has brought them.

The American people want economic growth and prosperity brought about by the workings of free enterprise, not Government. The Director of OMB can play a crucial role in fulfilling this national dream.

Jim Miller clearly is friendly to these aspirations and has the intelligence and skill to make them a reality. He deserves our support.

Thank you, Mr. Chairman.

Senator **DURENBERGER**. Thank you.

Ms. Claybrook.

Ms. **CLAYBROOK**. Thank you, Mr. Chairman. My name is Joan Claybrook, and I am president of Public Citizen. It is a national public interest organization located in Washington, DC. My main purpose in being here today is to urge the Congress in reviewing this nomination to look at the issue of secrecy in the dealing with regulation at the Office of Management and Budget.

Senator **DURENBERGER**. Pull the microphone a little closer, please.

Ms. **CLAYBROOK**. For the Congress to take a look at the issue of secrecy and the handling of regulatory review by the Office of Management and Budget. This issue has been raised by a number of Senators here today. We want to reemphasize the problem, because regulations are not proceeding on a timely basis, as has been brought out.

The Office of Management and Budget has private dealings with individuals concerned about the regulations under review, and in effect, it has become a decisionmaker in the course of the regulatory process.

The Administrative Procedure Act, which was enacted in 1946, has a number of basic notice and fairness procedural requirements. That includes the noting of ex parte communications and comments by people who wish to have their voice heard during the course of the consideration of regulation.

The OMB now, assuming a super role, if you would, in the regulatory process, the Office of Management and Budget has communications all the time with people interested in regulations, and yet there is no logging of those communications, nor of the communications between the OMB and the agencies. Many times, the decisions are not ones based on the scientific value or or facts. Rather, it is based on the special pleadings of people who make their views heard through the Office of Management and Budget without being on the record.

So we are here today to urge the Congress in looking at this nomination to ask Mr. Miller to open up to due process when he assumes this new post and to also consider legislation which would similarly require an open process to reestablish the Administrative Procedure Act where the Office of Management and Budget is concerned.

That is the thrust of my testimony, Mr. Chairman. I appreciate the opportunity to present it.

Chairman ROTH. Thank you. I don't know if you were here at the time this issue was mentioned. This matter was brought up by a number of Senators on both sides of the aisle. Senator Durenberger did ask that Mr. Miller agree to appear before his subcommittee which has jurisdiction over this matter, to testify within 2 months or 60 days.

Ms. CLAYBROOK. We are very pleased to hear that.

Chairman ROTH. I think there will be a followthrough on that. I want to express my appreciation to both of you for coming forward today, and I am sorry you had to wait so long.

Thank you very much.

[The prepared statements of Mr. Fink and Ms. Claybrook follow:]

C/S/E

Testimony of
Richard H. Fink, President
Citizens for a Sound Economy
before the Senate
Committee on Governmental Affairs
Confirmation Hearings on
the nomination of
James C. Miller, III
as Director,
Office of Management and Budget
September 24, 1985

Mr. Chairman, I am pleased to come before the committee this afternoon in support of the nomination of James C. Miller. As President of a broadly-based 200,000 member citizen's organization, I appreciate the work Mr. Miller has done as chairman of the Federal Trade Commission, and in his previous position at OMB. I believe he has established a record of which he can be justly proud, and one which is appealing to a wide spectrum of Americans.

The crucial topic before us today is the economic welfare of 220 million Americans. This nomination must be judged by how well it promotes that welfare, and how well it serves the goal of bringing about greater abundance in the years ahead. I believe that it furthers both goals.

CITIZENS FOR A SOUND ECONOMY [illegible]

By far the most serious economic problem we face is the mounting federal deficit. This deficit is at the heart of many of our other concerns about the economy. It fuels problems in the realm of international trade, making American products less competitive. It consumes investment capital which could be put to better use fueling job-creating enterprises in the private sector. It threatens to spur a tax increase which would again drain money from the effort to invest in making American companies competitive in a changing world economy.

This deficit sometimes appears to be an intractable problem which can only get worse. But it need not be. Through bipartisan cooperation and a willingness to reevaluate the role government plays in our economy, it can be reduced. I believe Jim Miller has shown he has what it takes to work closely with the President and Congress to develop a solution.

The Director of the Office of Management and Budget must be a person of vision and courage. He must be a creative thinker, and a good negotiator. And he must recognize that government is more often part of the problem than part of the solution. Jim Miller is such a man.

Jim Miller has shown he can handle a tough assignment. As the first economist to head the Federal Trade Commission, he singlehandedly salvaged the commission from its darkest period. We should remember that frustration with the FTC during the previous administration reached such a point that Congress shut the agency down for a day in 1980, and the Washington Post labled the Commission America's self-appointed "national nanny."

Jim Miller redirected the FTC with the clearly defined goal of doing what was best for the consumer, and what would best promote sustained, job-creating economic growth. He recognized that the Commission was not created to tell businessmen how to run their business. He recognized that a competitive environment is best for stimulating the kinds of innovations which will help us move with confidence into the 21st Century. He also recognized that scarce resources can be squandered in needless confrontations between the government and the private sector.

This realistic attitude manifested itself in turning an agency which previously had more than 50 percent of its decisions overturned by the federal courts into an agency that obtained private sector compliance through cooperation and education.

Jim Miller has also shown strong leadership in his willingness to question the efficacy of many aspects of government's regulatory role. As the first administrator of the Office of Information and Regulatory Affairs at OMB, as executive director of the Presidential Task Force on Regulatory Relief, and as Chairman of the FTC, Miller has been in the forefront of redefining the role of regulatory agencies in a mode consistent with encouraging competition and entrepreneurial creativity. His efforts in this area have saved consumers and taxpayers over $150 billion. If 'by his deeds we shall know him,' then few can claim such sterling credentials to oversee the nation's budget.

Two national elections have demonstrated that the overwhelming majority of Americans want a government that spends less and reduces its interference in their economic affairs. Despite the special pleading we in Washington will always hear from interest groups promoting the agendas of narrow constituencies, Americans have welcomed deregulation and have gladly pocketed the savings it has brought them. The American people want economic growth and prosperity brought about by the workings of free enterprise, not government. The director of OMB can play a crucial role in fulfilling this national dream. Jim Miller clearly is friendly to these aspirations, and has the intelligence and skill to help make them a reality. He deserves our support.

TESTIMONY OF JOAN CLAYBROOK, PRESIDENT, PUBLIC CITIZEN

HEARING ON THE NOMINATION OF JAMES C. MILLER III
TO BE DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET

SEPTEMBER 24, 1985, BEFORE THE
U.S. SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

* * * * *

Mr. Chairman and members of the Committee, thank you for giving me the opportunity to present the views of Public Citizen on the nomination of James C. Miller III to be Director of the Office of Management and Budget. I wish to speak on a matter of great importance regarding OMB's relationship with Congress and the departments and agencies of the executive branch.

The federal budget with its $200 billion deficits is only half of the responsibilities of the Office of Management and Budget. While other witnesses appearing before this committee will offer their views on Jim Miller's qualifications to oversee the government's financial planning activities, Public Citizen asks this Committee and the Senate to use this confirmation hearing to find out whether Mr. Miller intends to continue OMB's clandestine, off-the-record political interference in the regulatory process.

I'm referring, of course, to OMB's use of Executive Orders 12291 and 12498 to control the development and promulgation of federal regulations from their conception to their often premature deaths. E.O. 12291, signed by President Reagan on February 17, 1981, less than a month after his first inauguration, for the first time injected OMB into the regulation-writing process immediately before an agency or department was to publish a Notice of Proposed Rule Making; OMB has used the authority purportedly given it by E.O. 12291 to force Federal officers to amend, delay, and withdraw regulations required by law or intended by Congress.

Only late last week, the Senate expressed its frustration with OMB's refusal to complete its review of EPA's proposed drinking-water regulations, which have been at OMB for almost six months. By unanimous consent, the Senate adopted an amendment to the Superfund bill that will, if agreed to by the House, force OMB to release the regulations by October 9. Public Citizen, joined by five chairmen of committees of the House of Representatives as amici, is challenging in court OMB's interference with the Occupational Safety and Health Administrator's attempt to limit worker exposure to ethylene oxide, a potent carcinogen; the Environmental Defense Fund has sued to force the Environmental Protection Agency to publish regulations, blocked by OMB but required by statute to have been published last March 1, concerning the storage of hazardous waste in underground tanks. These are only three flagrant examples of OMB's misuse of E.O. 12291.

Not content with E.O. 12291's ability to obstruct Congressional efforts to protect the public health and safety, the administration this year issued E.O. 12498, effectively inserting OMB's secret and unaccountable "regulatory review" tentacles into every rule-making proceeding when the anticipated regulation is little more than a gleam in an official's eye. E.O. 12498 purports to be nothing more than a framework for developing the president's annual "regulatory program," but under the order OMB claims the right to tell agency and department heads which proposed rules and regulations they may work on, which studies and hearings they may conduct to determine whether a rule is needed, and what information they may collect from any source, within or without the Federal government, if that information may assist them in deciding whether there is any need for a rule.

It is an article of faith among Reagan administration officials that Federal agencies often waste millions of dollars developing rules and regulations that are never published in final form, and Jim Miller is a champion of the idea that money should not be spent until the need for regulation is clear. The obvious Catch-22 in that idea - you have to spend money to decide whether the regulation is needed, doing precisely the same kind of investigation that would be done in developing a regulation after public notice and solicitation of comments - deters the administration not at all.

OMB's secrecy is improper because it prevents Congress and the public from knowing whether the administration is properly carrying out its duty to "take care that the laws are faithfully executed," that is, its duty to write and enforce the rules and regulations needed to give meaning to laws enacted by Congress. OMB's use of the two executive orders has all but repealed the Administrative Procedure Act, which was designed both to prevent improper and off-the-record interference in the regulatory process by special - and some times corrupt - interests and to ensure that when Federal rules were written, justice "was seen to be done."

The executive orders have effectively made OMB one of the decision-makers in the regulatory process - a decision-maker whose vote is always on the winning side - but OMB denies that its regulatory review procedures are subject to the Administrative Procedures Act's requirement that a public record fully disclosing all outside contacts be kept for each rule-making proceeding. Because "special interest" contacts with OMB are, under E.O. 12291 and E.O. 12498, the same as contacts with the agency responsible for the rule, the executive orders have all but wiped the APA's "full record" requirements from the books.

The Administrative Procedure Act was written 30 years ago to prevent exactly the sort of "back room" regulation that OMB is now enthusiastically pursuing under E.O. 12291 and 12498. Because it requires all outside comments to be on the record and available for public scrutiny and judicial review, the APA has protected the regulatory process. E.O. 12291 and E.O. 12498 are the excuses the Reagan Administration uses in its efforts to cripple enforcement of laws and regulations that the President and his political advisers find distasteful.

If OMB's decisions under E.O. 12291 and E.O. 12498 were made public and, along with OMB's reasons, were available to Congress, the public, and the courts, the administration's regulatory policies would be open to scrutiny. When the reauthorization of the Paperwork Reduction Act of 1980 was being considered in 1984, Public Citizen testified in support of proposed new Section 3518, which would have brought OMB's actions under these two executive orders into the full light of day by requiring that OMB's files regarding proposed rules and regulations be included in the public record. Although the bill did not pass for other reasons, we urge the Congress and this committee to reconsider the question of OMB's public accountability, now that Public Citizen, the Environmental Defense Fund, and others have come forward with clear evidence of OMB's illegal interference in agency attempts to fulfill their Congressional mandates.

OMB has used these executive orders to make itself a secret "Star Chamber" for rules and regulations that conflict with the administration's philosophy, even though the regulations may be entirely consistent with Congress' statutory direction to the department or agency. OMB conducts its review and oversight of the regulatory process behind closed doors, neither recording nor making public its contacts with representatives of business and industry, with contributors to political campaign funds, with White House political staff, and with members of Congress. Jim Miller thinks that's just fine; as he said in an interview published when he was administrator of the Office of Information and Regulatory Affairs, "In the case of an agency rulemaking, I see no problem in off-the-record contacts with us - although for appearance' [sic] sake it might be good for all formal written presentations to be made public, and maybe notes of any particular business as well." (Interview in "Regulation" magazine, March/April 1981)

Both executive orders are cleverly drafted. E.O. 12291 defines what is an acceptable regulation in such inconsistent ways that OMB may disapprove of a regulation because it costs too much, or because it doesn't cost enough, or because it doesn't benefit enough people, or because it benefits the wrong people. E.O. 12498 is intimately cross-referenced to E.O. 12291 so that an agency's preliminary study request may be disapproved because no preliminary study has been done to justify the preliminary study, and any proposal that gets past that hurdle in E.O. 12498 must then be accompanied by a written explanation of why it conflicts with E.O. 12291's requirements. Only in the most unusual circumstances, involving simple and noncontroversial regulations, will any regulatory proposal not at least arguably conflict with one or more of the many requirements defined in E.O. 12291.

Although OMB claims to prohibit its staffers from receiving any "factual" information from outside sources unless a record is made, there is no such requirement for "non-factual" communications from anyone, and Jim Miller himself, when in 1981 he was administrator of OMB's Office of Information and Regulatory Affairs, told a subcommittee of the House that only "factual" communications would be recorded.

This year, when the president's first annual "regulatory program" under E.O. 12498 was being prepared, then-OMB Director David Stockman said that after this year

OMB will not make available to either Congress or the public any of the drafts, proposals, discussions, or decisions preceding publication of the final, public "regulatory program." Mr. Stockman permitted agencies and departments to provide those materials to Congress this year, he said, only because many executive branch officials had gone ahead and made them public before he realized what was going on.

Members of this committee last month received copies of The Regulatory Program of the United States Government, a clone of the Manhattan phone book that shares with that directory the omission of an unknown quantity of "unlisted numbers" - in the program's case, the regulations proposed by agencies but deleted by OMB for political or debatable "cost-benefit" reasons during its review of agency and departmental recommendation. The two executive orders that I am talking about are included in the back of the book, about where you'd find "Xylophones" in the Yellow Pages.

In the light of Jim Miller's self-proclaimed "expertise" and enthusiasm for "cost-benefit" analysis and deregulation, it is almost certain that as Director of OMB he will concentrate his attention on the bureau's "management" responsibilities, particularly including the Office of Information and Regulatory Affairs, leaving the "budget" side of the equation firmly in the hands of White House Chief of Staff Donald Regan.

There is no secret about Miller's view of OMB's role in the regulatory process. While he was administrator of OIRA and director of the vice president's (de)regulatory task force, Miller testified before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce. Information provided to that subcommittee as part of Miller's testimony listed many contacts with businesses and industry groups while OMB was considering agency and department regulatory proposals of interest to those groups, yet neither the documents nor Miller in his testimony offered any useful information regarding what the outsiders said and what consideration OMB gave their views in conducting its work under E.O. 12291.

Under Miller, OIRA will continue its Reagan-administration tradition of imposing cost-benefit analyses on executive branch regulations, including those mandated by statutes that either make no mention of cost-benefit considerations or that clearly exclude them; it will serve as a conduit into the administration for ex parte, unrecorded communications from business and industry representatives, communications that will influence, perhaps even kill, pending regulations without ever appearing in the public record required by the Administrative Procedure Act and necessary for public and judicial accountability; and OIRA will delay for months or even years the promulgation of rules and regulations clearly and unequivocally required by Congress.

We urge this Committee to press Mr. Miller on these issues and to demand that, at a minimum, OMB publish and enforce three basic rules that will go far toward eliminating the taint of back-room deals that now inevitably infects the regulatory review process: (1) all written comments and drafts exchanged between any agency or department and OMB will be placed in the rulemaking file; (2) significant oral communications between OMB and any other party, in or out of government, regarding any regulatory action, will be summarized in writing and placed in the rulemaking file; and, (3) written communications between OMB and any other party regarding any regulatory action will be placed in the rulemaking file.

Mr. Miller, of course, will demur to any suggestion that OMB's activities under the executive orders in any way conflict with the Constitution or with the requirements Congress has written into statutes. He and other OMB representatives have repeatedly pointed out that the orders specifically state that neither OMB nor the agency heads that are actually responsible for writing Federal regulations may do anything contrary to law. That is technically correct, but, as the examples I've mentioned make clear, what OMB does is very different from what it says it does. Public Citizen is currently investigating OMB's interference in the Federal regulatory process and expects to document other instances of administrative irregularity.

The nominee thinks it right and proper that OMB should make regulatory decisions entrusted by Congress to others. When he was administrator of OMB's Office of Information and Regulatory Affairs in 1981, Mr. Miller said, "You know, if you're the toughest kid on the block, most kids won't pick a fight with you. The executive order established things quite clearly. * * * So if you want to get ahead, you're going to have to write new rules and review existing rules in conformance with the principles set forth by the president in the executive order." (Interview in "Regulation" magazine, March/April 1981) He meant that OMB's implicit threat to cut a department's or agency's budget is sufficient to convince executive branch managers to take OMB's "comments" on proposed regulations as the last word; it is revealing that in the same interview, Miller noted that agencies often sent copies of proposed regulations to their OMB "budget" side officer at the same time they were transmitted to OIRA.

Jim Miller's commitment to OMB's program of delaying, eviscerating, even killing Congressionally-mandated regulations is beyond question; he is, after all, the man who "wrote the book" on deregulation for the Reagan Administration. Public Citizen disagrees completely with Mr. Miller's belief that the executive branch has the right to impose its own political policy choices on statutes and programs written into law by Congress and signed by the president. The issue is not whether Jim Miller will be confirmed as Director of OMB; the issue today is whether this committee and this Congress will demand that Mr. Miller, as director of OMB, cease the secret and improper use of Executive Orders 12291 and 12498 to continue the illegal concentration of legislative power in the administration's hands.

Chairman **Roth**. Senator Burdick and Congressman Molinari have each submitted a statement which will be placed in the record.[1] I believe this completes the hearing. The committee will stand in recess.

[Whereupon, at 3:10 p.m., the committee was recessed, subject to the call of the Chair.]

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[1] See p. 284 and p. 287.

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

COMMENTS SUBMITTED BY SENATOR GORE

In the case of Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981), the Court of Appeals for the District of Columbia Circuit refused to prohibit interagency, intraexecutive post-comment-period meetings, but noted that, at a minimum, docketing of such lower-level intraexecutive meetings may be necessary. In Sierra Club, the court pointed out that, in that instance, the agency had voluntarily docketed summaries of each of the intraexecutive meetings in question. The court nevertheless directed the agency to submit affidavits discussing the substance of critical contacts in order to ensure the adequacy of the record and to fulfill its responsibility to review the agency decision according to the full record which was before the agency at the time it rendered its decision. The court noted further that, during the relevant time period, the Justice Department had recommended that all conduit contacts be placed in the agency rulemaking record. Thus, based upon the court's review of the agency's docketed summaries and the affidavits submitted in the case, the court found "no reason to believe that a policy similar to this was not followed . . . , or that unrecorded conduit communications existed . . . ." 657 F.2d at 405 n.520; see Rosenberg, Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291, 80 Mich. L. Rev. 193, 243-44 (1981). See also, Olson, The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291, 4 Va. J. Nat. Res. L. 1 (1984).

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 84-1252, 84-1392 & 85-1014

PUBLIC CITIZEN HEALTH RESEARCH GROUP, et al.,

Petitioners,

v.

ROBERT A. ROWLAND, Assistant Secretary of Labor,
Occupational Safety and Health Administration, et al.,

Respondents.

On Petitions for Review to the
Occupational Safety and Health Administration

BRIEF OF REPRESENTATIVES JOHN D. DINGELL, PETER W. RODINO, JR., JACK BROOKS, AUGUSTUS F. HAWKINS, AND WILLIAM D. FORD AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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June 23, 1985

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ARGUMENT

I. OMB'S INTERFERENCE IN OSHA'S ETO RULEMAKING PURSUANT TO EXECUTIVE ORDER 12,291 CONTRAVENED CONGRESSIONAL INTENT AS EXPRESSED IN THE OCCUPATIONAL SAFETY AND HEALTH ACT

In 1970, Congress enacted the Occupational Safety and Health Act to "assure so far as possible [to] every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b) (1982). To effectuate that goal, Congress delegated authority to the Secretary of Labor to promulgate occupational safety and health standards. *Id.* § 655(b). When regulating toxic substances such as EtO, the Secretary was instructed to "set the standard which most adequately assures, to the extent feasible . . . that no employee will suffer material impairment of health or functional capacity." *Id.* at § 655(b)(5) (1975). The OSH Act set forth procedures for promulgating such standards and provided for judicial review. *Id.* at § 655(b) and (f).

On February 17, 1981, President Reagan issued Executive Order 12,291. 3 C.F.R. § 127 (1982). The executive order requires all executive branch agencies to send all proposed and final regulations to OMB for pre-publication review. Executive Order 12,291, § 3(c). OMB is directed to review each regulatory action to ensure that the benefits of the regulation exceed its costs and that the regulation maximizes "aggregate net benefits to society." Id. at § 2. An agency may not issue a rule until it responds to OMB's comments. Id. at § 3(f)(2). Thus, under the Executive Order, OMB exercises a *de facto* veto power over all agency rulemaking.

In accordance with the substantive and procedural requirements of the OSH Act, OSHA and the Secretary of Labor conducted a rulemaking proceeding and promulgated a toxic substances standard to govern worker exposure to EtO. That standard included a STEL. Pursuant to Executive Order 12,291, OMB reviewed the EtO standard and intervened in the rulemaking process. The result was OMB's veto of the STEL.

This action was unlawful in three distinct ways. First, the shift of rulemaking authority to OMB contravened Congress' delegation of such authority to the Secretary of Labor. Second, OMB's interference in the EtO rulemaking contravened Congressional intent that OSHA rulemaking be subject to meaningful public participation and judicial review. Finally, OMB's application of cost/benefit analysis was inconsistent with the substantive criteria mandated by Congress in the OSH Act.

A. The Shift of Rulemaking Authority to OMB Contravened Congress' Express Delegation of Authority to the Secretary of Labor

OMB's interference in the EtO rulemaking violated Congress' clearly expressed mandate that health and safety standards be promulgated by the Secretary of Labor, the Executive Branch official with the resources and expertise essential to making the proper judgment as to how best to fulfill Congress' objectives in this area. See 29 U.S.C. § 655 (1975). In this case, the decision to delete the STEL was made not by the Secretary, but by OMB.

That Congress vested rulemaking power in this area only in the Secretary of Labor -- and not OMB -- is beyond peradventure. The Congressional declaration of purpose and policy in the OSH Act states:

> "The Congress declares it to be its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce. . . ."

29 U.S.C. § 651(b)(2) (emphasis added); see also Industrial Union Department v. Hodgson, 499 F.2d 467, 470, 474 (D.C. Cir. 1974).

Congress delegated this authority to the Secretary because of his expertise and the expertise of the Department in the area of occupational safety and health. Indeed, one key issue in the debate preceding passage of the OSH Act was whether rulemaking authority should be delegated to the Secretary of Labor or, as the Administration-backed substitute proposed, to an independent board. Those who successfully argued that the Secretary should promulgate standards relied upon the following factors: greater likelihood that the standards would thereby "be the result of a studied scientific approach which should characterize rulemaking of this type," 116 Cong. Rec. 37,339, (1970) (statement of Sen. Williams); the Secretary's "traditional[ ]. . . responsibility to set and enforce labor standards," id. at 37,626 (statement of Sen. Muskie); and the Secretary's "primary obligation . . . to protect the legitimate interests of workers and to enforce public policy in these areas," id. at 38,374 (statement of Rep. Cohelan). Moreover, Congress provided the Secretary with the means to augment his Department's existing expertise both by establishing a National Advisory Committee on Occupational Safety and Health to advise the Secretary and by granting the Secretary the authority to appoint advisory committees to make recommendations to him regarding particular occupational safety or health standards. 29 U.S.C. § 656.

Congress did not delegate any administrative rulemaking authority in the area of occupational safety and health to OMB. OMB's predecessor is not even mentioned in the OSH Act, and OMB lacks any administrative expertise in the area of occupational safety and health.

OMB's exclusion from the process is consistent with the long history of Congress' repeated refusal to enact regulatory reform legislation that would ratify broad OMB or presidential oversight of agency rulemaking. Thus, in 1941 the Report of the Attorney General's Committee on Administrative Procedure urged the creation of a "superagency" to coordinate and make periodic recommendations regarding administrative procedures. The Committee's report envisioned that the superagency would be empowered to require additional procedures and oversee the entire agency decisionmaking process. The proposal was rejected because of legislative concern that the decisions of such a superagency would be political. See discussion and citation, supra p. 12. Later attempts to achieve a broad, centralized substantive role for OMB have encountered the same concern, and have fared no better in Congress. *See* Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 Mich. L. Rev. 193, 221-25 (1981).

Most recently, Congress has refused to ratify Executive Order 12,291 through legislation. In the 97th Congress, the House Rules Committee, at the behest of several of the *amici*, declined to permit legislation codifying Executive Order 12,291 to come to a vote of the full House. *See* Testimony of Hon. John Dingell Before the House Committee on Rules on H.R. 746, The Regulatory Procedure Act of 1982 (Sept. 30, 1982); Testimony of Hon. Jack Brooks Before the House Committee on Rules on H.R. 746 (Dec. 9, 1982). In the 98th Congress, legislation to ratify the executive order was not even reported out of the Judiciary Committee's Subcommittee on Administrative Law. *See*, H.R. 2327, 98th Cong., 1st Sess. (1983). *See generally* Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 Va. J. Nat. Resources L. 1, 24 (1984).

Executive Order 12,291 on its face purports to recognize the Congressional limitation on its delegation of rulemaking authority to particular agencies. Section 3(f)(3) of the Executive Order expressly provides that it should not "be construed as displacing the agencies' responsibilities delegated by law." Indeed, in 1981 the Justice Department conceded that "[a] wholesale displacement might be held inconsistent with the statute vesting authority in the relevant official." Department of Justice, Office of Legal Counsel, Memorandum of February 13, 1981, _reprinted in_, _Role of OMB in Regulation: Hearing before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce_, 97th Cong., 1st Sess., 486, 489 (1981).

Respondents here argue that the Secretary of Labor did exercise his discretion in the decision to delete the STEL from the EtO standard. Brief for Respondents, pp. 87-94. But, in fact, it was OMB, and not the Secretary of Labor, that exercised administrative rulemaking authority and ordered the deletion of the STEL from the EtO standard. The facts permit no other conclusion.

On June 14, 1984, after a prolonged rulemaking process and just 24 hours before a judicially mandated deadline, the Secretary of Labor submitted to OMB an EtO standard which incorporated a STEL. The EtO standard was accompanied by a lengthy statement of the Secretary's reasons for his decision. No new evidence questioning the necessity of a STEL was introduced into the administrative record in the ensuing 24 hours. Nevertheless, the next day -- after OMB submitted its "comments" on the proposed standard -- the STEL and the reasons supporting its adoption were deleted from the EtO standard as published in the Federal Register. No effort was made to justify the deletion of the STEL as based upon any reasoned reconsideration by the Secretary of Labor of the administrative record as it stood on June 14; instead, all references to the STEL and the justifications therefor were simply blacked out of the June 14 document. Without doubt, OMB had exercised a naked, de facto veto over the EtO standard. See Olson, 4 Va. J. Nat. Resources L. at 43.

"If the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience." United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 266-67 (1954).[18] In this case, Congress' express delegation

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[18] The facts in this case are remarkably similar to those in Accardi. In that case, the Attorney General "made quite clear" to the Board of Immigration Appeals that he wanted the plaintiff deported as an "unsavory character[]." Id. at 267. The Supreme Court found

[Footnote continued on following page]

of rulemaking discretion to the Secretary of Labor was contravened by OMB. That unauthorized exercise of rulemaking power must be overturned by this Court and the Secretary of Labor's June 14, 1984 decision to adopt a STEL must be reinstated.

B. OMB Interference in the EtO Rulemaking Contravened Congress' Intent that OSHA Rulemaking Be Subject to Public Participation and Judicial Review

In the OSH Act, Congress did not simply delegate authority to the Secretary of Labor to promulgate occupational safety and health standards; Congress also mandated specific rulemaking procedures that provide for effective public participation and enhanced judicial review of standards promulgated under the Act. OMB, by relying on its asserted authority under Executive Order 12,291, interfered in the EtO rulemaking. That interference effectively barred both meaningful public

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[Footnote 15 continued from preceding page] that the Attorney General's actions were sufficient to charge him with dictating the decision to the Board, and to conclude that the Board had failed to exercise its own discretion regarding the plaintiff's appeal. Id. at 267-68. The Supreme Court's decision was unaffected by the fact that the Attorney General did not explicitly order the Board to rule in a particular way. As the Supreme Court noted: "It would be naive to expect such a heavy-handed way of doing things." Id. at 267.

participation and the opportunity for effective judicial review, because the basis for the rulemaking decision -- made by OMB -- was withheld from the administrative record.

1. Congress Intended To Provide for Meaningful Public Participation in OSHA Rulemaking

Both the Administrative Procedure Act and the OSH Act provide for meaningful public participation in informal agency rulemaking through the requirement of notice and comment procedures. Such procedures give "interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments." 5 U.S.C. § 553(c) (1982). The "hybrid rulemaking procedures" of the OSH Act, *see* *United Steelworkers of America* v. *Marshall*, 647 F.2d 1189, 1206 (D.C. Cir. 1980), *cert*. *denied*, 453 U.S. 913 (1981), augment this opportunity for public participation in OSHA rulemaking. In addition to traditional notice and comment procedures, Congress granted interested persons the right to a public hearing on their objections to a proposed rule. 29 U.S.C. § 655(b)(3).

On numerous occasions, this Court has stressed the "importance of citizen participation in a variety of administrative settings." Office of Communications of the United Church of Christ v. FCC, 707 F.2d 1413, 1441 n.91 (D.C. Cir. 1983). See Office of Communications of the United Church of Christ v. FCC, 465 F.2d 519, 527 (D.C. Cir. 1972) ("In recent years, the concept that public participation in decisions which involve the public interest is not only valuable but indispensable has gained increasing support."); Medical Committee for Human Rights v. SEC, 432 F.2d 659, 667 (D.C. Cir. 1970).[16] For such participation to be meaningful, however, the public must be fully informed of the facts upon which the agency bases its decision. As this Court stated in Action For Children's Television v. FCC, 564 F.2d 458, 471 (D.C. Cir. 1977):

> "The information gathered by the Commission during this informal rulemaking process, along with any information put forth by the agency itself, represent the factual basis on which the agency must necessarily proceed in making its final determination. This factual predicate must be limited in this way in order to give interested parties proper notice of the reasoning behind the agency's actions and to give meaning to the right to submit comments on the proposed rule."

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[16] See also Gellhorn, Public Participation in Administrative Proceedings, 81 Yale L. J. 359 (1972); Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1760 (1975).

OMB's preemptive actions here deprive the public of these essential procedural rights, contrary to Congress' direction.

2. Congress Intended To Provide for Effective Judicial Review of OSHA Rulemaking

In addition to providing the means for meaningful public participation in agency rulemaking, both the APA and the OSH Act subject agency action to effective judicial review. Under the APA, informal agency rulemaking determinations are upheld on review unless they are "arbitrary and capricious." 5 U.S.C. § 706(2)(A) (1982). Under this standard, judicial review must be both "searching and careful." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). In the OSH Act Congress underscored its concern for meaningful judicial review by requiring that the Secretary's determinations be "supported by substantial evidence in the record considered as a whole." 29 U.S.C. § 655(f).

In order for a court to review effectively the Secretary's decisions under either standard, the court must be fully informed of the bases for those decisions. Action for Children's Television v. Federal Communications

Commission, 564 F.2d at 471. This requires, in addition to the agency's statement of reasons for its action, the existence of an accurate agency rulemaking record that contains all of the factual evidence upon which the agency based its decision. See Industrial Union Department v. Hodgson, 499 F.2d 467, 475-76 (D.C. Cir. 1974). See also Home Box Office v. FCC, 567 F.2d 9, 54 (D.C. Cir.) cert. denied, 434 U.S. 829 (1977) ("As a practical matter, Overton Park's mandate means that the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings."); Olson, 4 Va. J. Nat. Resources L. at 32 ("Effective judicial review . . . requires an accurate record of the arguments and facts before the agency decision maker."). Indeed, OSHA's own regulations recognize the need for a complete administrative record. 29 C.F.R. § 1911.15(a)(2) (1984) (discussing "congressional expectation that the rulemaking would be on the basis of a record to which a substantial evidence test, where pertinent, may be applied").

Effective judicial review also requires that the public have the opportunity for meaningful comment during the rulemaking process. This Court's prior decisions recognize that "[s]uch comment serves not only to clarify the issues and positions being considered at the agency level, but also to ensure that factual questions underlying the agency's decision are not raised, by necessity, for the first time on judicial review." Environmental Defense Fund v. Blum, 458 F. Supp. 650, 659 (D.D.C. 1978) (quoting United States Lines, Inc. v. Federal Maritime Commission, 584 F.2d 519, 542 (D.C. Cir. 1978)); see also Home Box Office v. FCC, supra, 567 F.2d at 55.

3. OMB's Displacement of OSHA's Decisionmaking Authority Prevented Meaningful Public Participation and Effective Judicial Review

In this case, OMB's arrogation of rulemaking power to itself effectively subverted Congress' intent. Unlike OSHA, OMB's decisionmaking process is governed by neither the hybrid rulemaking requirements of the OSH Act, nor the informal rulemaking requirements of the APA. There is no record of the communications and comments OMB received from industry,[17] and there was

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[17] OMB often actively solicits comments from industry on specific rules and OMB personnel meet frequently with industry representatives. OMB then serves as a secret conduit to administrative agencies for industry views. Olson, 4 Va. J. Nat. Resources L. at 55-57. In the present case, for example, we are aware that such industry contacts took place only because OMB's

[Footnote continued on following page]

no opportunity for petitioners here to respond to those communications.[18] The net result was, as this Court has repeatedly warned in the past, to "create the danger of 'one administrative record for the public and this court and another for the Commission.'" Sierra Club v. Costle, 657 F.2d 298, 401 (D.C. Cir. 1981) (quoting Home Box Office v. FCC, 567 F.2d at 54).

In this case, the record for the public and the court was that of OSHA, while the record on which the decision was actually made was the secret record of OMB. This Court should not lend its authority to this rulemaking "process," by reviewing OSHA's administrative record as if it were the real basis for the rulemaking in this case. Attempts by respondents to justify the deletion of the STEL on the basis of the public record

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[Footnote 17 continued from preceding page] "comments" on the EtO STEL so closely parroted those of industry groups opposed to the standard. See Brief for Petitioners, p. 55; Brief for Respondents, p. 83, n.68.

[18] Neither was there any docketing of the ex parte contacts from OMB to OSHA and from OSHA to OMB. This is no accident: most criticisms by OMB of agency rules are delivered orally so as not to "leave fingerprints" in the administrative record, Washington Post, July 10, 1981, at A21, Col. 2 (quoting Jim Tozzi, OMB, OIRA Deputy Administrator). OMB "vehemently oppose[s] any effort to require it (or an agency) to log, summarize or docket the Office's oral contacts with the agency or outside parties." Olson, 4 Va. J. Nat. Resources L. at 59.

are a form of post hoc rationalization, not entitled to credence by this Court. Cf. American Textile Manufacturers Institute v. Donovan, 452 U.S. 490, 539 (1981) (in reversing OSHA regulation based on inappropriate criteria, Supreme Court noted that "the post hoc rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action").

In Environmental Defense Fund v. Blum, 458 F. Supp. at 661, Judge Gesell wrote that an "agency may not . . . skew the 'record' for review in its favor by excluding from that 'record' information in its own files which has great pertinence to the proceeding in question." OMB and OSHA have done exactly that here, by hiding the real record from the public and from this Court. OMB's displacement of OSHA's decisionmaking authority, therefore, not only violated Congress' intent that the decision be made by the agency with appropriate expertise, but also violated Congress' determination that the decision be made by an agency operating under procedures which afford the opportunity for meaningful public participation and effective judicial review.

C. OMB's Application of Cost/Benefit Analysis Contravened Substantive Criteria Expressly Mandated by Congress in the OSH Act

Finally, OMB's interference in this matter forced substantive decisionmaking criteria -- standards that Congress did not want applied under the OSH Act -- to govern the outcome of this rulemaking. By requiring OSHA to apply statutorily impermissible cost/benefit criteria, rather than the health and safety criteria embodied in the Act, OMB effectively subverted the will of Congress. Indeed, the result further confirms the need to honor Congress' decision to repose rulemaking discretion with the health and safety experts of OSHA, and not with OMB.

The Secretary of Labor and OSHA promulgated the EtO's standard at issue in this case pursuant to Section 6(b)(5) of the OSH Act. That section provides in relevant part:

> "The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." 29 U.S.C. § 655(b)(5).

The Supreme Court's interpretation of this provision makes clear that, once OSHA has determined that a particular toxic substance poses a "significant risk" to worker health, the agency must promulgate a standard restricting exposure to that toxic substance that will minimize that risk to the greatest extent possible. American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490 (1981). As the Court held in American Textile, OSHA may not balance the benefits of such a standard against the costs of its implementation, because Congress placed "the 'benefit' of worker health above all other considerations save those making attainment of this 'benefit' unachievable." Id. at 509. Cf. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 411-13 (1971) (where statute prohibited construction of highways through public parks if "feasible and prudent" alternatives existed, Secretary of Transportation was prohibited from balancing the benefit of parkland preservation against its costs; statute made protection of parkland of paramount importance).

Despite this clear statement by both Congress and the Supreme Court regarding the meaning of Section 6(b)(5), OSHA deleted the portion of its proposed

EtO standard requiring a STEL on the basis of cost/benefit criteria.[19] This decision was prompted by a letter to OSHA from OMB, part of OMB's review of agency rulemaking under Executive Order 12,291. OSHA's preamble to the rule issued on June 15 acknowledges that the decision to delete the STEL was based largely on the reservations expressed by OMB. 49 Fed. Reg. 25,734, 25,775 (1984). The gravamen of the objections expressed in that letter was OMB's conclusion "that the rule is inconsistent with the policies of Executive Order 12,291" which imposes -- supposedly only to the extent permitted by law -- cost/benefit analysis on all agency rulemaking. See letter from DeMuth to Lilly, supra, Jt. App. 415.

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[19] The government in its brief contends that the decision not to implement the STEL was based not on cost/benefit criteria, but on concerns raised regarding the STEL's "cost-effectiveness" and regarding the risk to worker's health if only a PEL were implemented. Brief for Respondents at 75, n.58. OSHA's ultimate statement of reasons for not promulgating a STEL as part of the EtO standard was carefully crafted so as to avoid reliance on cost/benefit criteria. 50 Fed. Reg. 64 (1985). However, the assertion that cost-effectiveness and risk assessment criteria were decisive is not credible.

OSHA's June 14. 1984 version of the EtO standard, which included the STEL provision, made clear that a significant risk to worker health would still exist if only the one ppm PEL were implemented. June 14 Document at 217; App. 228. OSHA concluded that inclusion of a STEL would "significantly augment the employee protection provided by the [PEL]." Id. at 218, App. 229. Nor can OSHA's decision to delete the STEL be justified on cost-effectiveness grounds. Such a justification would require replacing the STEL with a less costly, but equally effective measure. In contrast, OSHA simply deleted the STEL from the proposed standard; no compensating factor was added. Therefore, the decision to delete the STEL can only be explained on cost/benefit grounds. This justification for not imposing a STEL was foreclosed to OSHA by the Supreme Court's decision in American Textile.

In other circumstances, OMB has insisted, in clear violation of Executive Order 12,291, that agencies employ cost/benefit analysis where application of such criteria was precluded by statute. For example, former EPA Chief of Staff John Daniel testified that even though by statute certain EPA rules had to be based exclusively on health considerations, OMB kept "trying to shape the standard and kept urging upon us consideration of the costs through certain types of analyses that really were not permitted . . . under the statute." EPA: Investigation of Superfund and Agency Abuses (Part 3): Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. 81 (1983) (Testimony of John Daniel).

An agency engaged in rulemaking "must give effect to the unambiguously expressed intent of Congress." Chevron v. Natural Resources Defense Council, 104 S. Ct. 2778, 2781-82 (1984). "When Congress directs an agency to consider only certain factors in reaching an administrative decision, the agency is not free to trespass beyond the bounds of statutory authority by taking other factors into account." Lead Industries Ass'n. v. EPA, 647 F.2d 1130, 1150 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider. . . ." Motor Vehicles Manufacturers

Association v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29, 43 (1983).

Here Congress made clear its intent that OSHA was only to consider feasibility, not cost/benefit considerations, in promulgating toxic substances standards; this mandate was confirmed by the Supreme Court in American Textile. OSHA, therefore, is precluded from applying cost/benefit analysis in promulgating the EtO standard. Cf. Center for Science in the Public Interest v. Department of the Treasury, 573 F. Supp. 1168, 1174 (D.D.C. 1983), app. dismissed, 727 F.2d 1161 (D.C. Cir. 1984) (agency could not rescind regulation on the basis of cost/benefit criteria where Congress had not included such criteria as a basis for the exercise of discretion by the agency under its statutory mandate). See also Silverglade, Judicial Control of Regulatory Action Based on Cost/Benefit Analysis, 36 Admin. L. Rev. 387, 391 (1984) ("[t]he Supreme Court's decision [in State Farm] stands for the proposition that agencies can only consider cost factors to the extent that their statutory mandate permits them to do so").

Executive Order 12,291 cannot provide an "independent basis" for OSHA's consideration of cost/benefit factors in its decision to delete the STEL from the EtO standard. First, as indicated above, those factors are applicable to agency rulemaking only "to the extent permitted by law." Executive Order 12,291, § 2. More importantly, "[u]nder the structure of government -- the separation of powers -- established by the Constitution, the President has no authority to alter policy and principles declared by Congress." National Federation of Federal Employees v. Brown, 645 F.2d 1017, 1025 (D.C. Cir. 1981). An executive order cannot supersede a statute. Marks v. Central Intelligence Agency, 590 F.2d 997, 1003 (D.C. Cir. 1978).

At least one United States District Court has overturned an attempt by an administrative agency to base the rescission of a regulation on Executive Order 12,291 where the agency's Congressional mandate precluded cost/benefit consideration. In Center for Science in the Public Interest v. Treasury, 573 F. Supp. at 1175, Judge Pratt held that "the broad thrust of Executive Order No. 12,291 provides an insufficient basis for the defendants to disregard their statutory duties." Likewise, OSHA's deletion of the STEL provision in its June 15 EtO standard was based on statutorily impermissible cost/benefit criteria. This Court should rescind the deletion and order OSHA to promulgate the

EtO standard as written on June 14, 1984 with a 10 ppm 15-minute STEL.

II. OMB'S INTERFERENCE IN OSHA'S ETO RULEMAKING CANNOT BE JUSTIFIED AS A VALID EXERCISE OF EXECUTIVE POWER UNDER ARTICLE II OF THE CONSTITUTION

For the reasons set forth above, OMB's interference in OSHA's EtO standard-setting under the purported authority of Executive Order 12,291 violated Congressional intent in three ways: it displaced the Secretary of Labor as the administrative decisionmaker; it prevented meaningful public participation in and effective judicial review of the rulemaking; and it caused the application of statutorily impermissible substantive criteria. Such interference with a proper exercise of Congressionally delegated rulemaking authority cannot be justified as a valid application of executive power under Article II of the Constitution. It is instead a usurpation of Congress' legislative prerogatives.

It is indisputably true, as Respondents contend, that the President "may require the opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." U.S. Const. art. II, § 2, cl. 1. The President, relying on his constitutional obligation to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, also has the power to remove a subordinate officer, even if that officer enjoys certain rulemaking authority delegated by Congress. See Myers, Administratrix v. United States, 272 U.S. 52 (1926). And, in fulfilling his duties under the "take care" clause, the President may "supervise and guide" subordinate officers' "construction of the statutes under which they act in order to secure . . . uniform and unitary execution of the laws." Id. at 135. As this Court summarized in Sierra Club v. Costle: "To ensure the President's control and supervision over the Executive Branch, the Constitution -- and its judicial gloss -- vests him with the powers of appointment and removal, the power to demand written opinions from executive officers, and the right to invoke executive privilege to protect consulative privacy." 657 F.2d at 405 (footnote omitted).

No court, however, has ever held that the President may go further and "ensure [his] control and supervision over the Executive Branch" by dictating the outcome of a rulemaking process to the agency charged by Congress with administrative discretion. The President's authority over subordinate executive officials is not absolute and does not extend to usurping the legislative power invested in Congress by Article I of the Constitution and delegated by Congress to a specified agency. As noted by Chief Justice -- and former President -- Taft, writing for the Court in Myers: "Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable or effective." 272 U.S. at 135. Notwithstanding the President's authority to guide and supervise subordinates, "there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may override or revise the officer's interpretation of his statutory duty in a particular instance." Id.[28] Accord, United States ex rel. Accardi v. Shaughnessy, 374 U.S. at 267-68 ("[i]f the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience"). In such circumstances, the President's remedy -- if he finds "that the discretion regularly entrusted to that officer by statute has not been . . . wisely exercised" -- is to "consider the decision after its rendition as a reason for removing the officer. . . ." Myers, 272 U.S. at 135 (emphasis added).

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[28] Also in this category, suggested the Chief Justice, "may be duties of a quasi-judicial character imposed on executive officers . . . the discharge of which the President cannot in a particular case properly exercise or control." Id.

Chief Justice Taft's suggestion that, although the President may remove executive officers if he is dissatisfied with their performance, he may not interfere with their execution of their duties, is consistent with a long line of legal opinions dating back to the early days of our Republic. Attorney General opinions throughout the nineteenth century emphasize that the President may not displace nor interfere with subordinate officials in the exercise of their statutory duties.

> "The constitution assigns to Congress the power of designating the duties of particular officers: the President is only required to take care that they execute them faithfully . . . . If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only not be taking care that the laws were faithfully executed, but he would be violating them himself."

1 Op. Att'y. Gen. 624, 625-26 (1823).

> "It has repeatedly been held that the observance of your constitutional duty of taking care that the laws be faithfully executed does not itself warrant your taking part in the discharge of duties devolved by law upon an executive officer."

18 Op. Att'y. Gen. 31, 33 (1884).

> "The President has . . . take[n] care that the laws be faithfully executed; that is, that the other executive and administrative officers of the government faithfully perform their duties; but the statutes regulate and prescribe these duties, and he has no more power to add to, or subtract from the duties imposed upon subordinate executive and administrative officers by the law, than those officers have to add or subtract from his duties."

19 Op. Att'y. Gen. 685, 686-87 (1890).[21]

These Attorney General opinions on the limits of Executive authority accurately reflected prior judicial interpretations on the scope of Article II powers. For example, in Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838), the Supreme Court considered the issue of Presidential authority to direct a subordinate officer's performance of ministerial duties delegated by Congress. The Court rejected the contention that the "take care" clause authorized Presidential involvement in the tasks at issue:

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[21] Against this long line of authority, Respondents cite only Attorney General Cushing's view that "no Head of Department can lawfully perform an official act against the will of the President." 7 Op. Att'y. Gen. 453, 469-70 (1885) cited in Brief for Respondents, p. 86. "The opinion was called 'extreme' by a prominent early commentator." Rosenberg, Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291, 80 Mich. L. Rev. 193, 204 n.55 (1981) (quoting F. Goodnow, The Principles of the Administrative Law of the United States, 81 (1905)). Moreover, the language quoted by Respondents appears to apply to something not at issue here -- the performance of a purely "executive" function, as compared to one delegated to a subordinate executive officer by the Congress. See generally, 7 Op. Att'y Gen. at 469-70.

> "It was urged at the bar, that the postmaster general was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law, and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice.
>
> "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." Id. at 612-13.

In short, where a valid duty is imposed upon an executive officer by Congress, "the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President."

Id. at 610. The present Administration has acknowledged as much. In its 1981 memorandum justifying Executive Order 12,291, the Justice Department acknowledged this limitation on Presidential authority: "[I]t is clear that the President's exercise of supervisory powers must conform to legislation enacted by Congress. In issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress." Memorandum of February 13, 1981, supra p. 33, at 488 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)) (footnote omitted). Moreover, the Justice Department memorandum went on to make a point specifically applicable here: "Congress may constitutionally conclude that some statutory responsibilities should be carried out by particular officers without the President's revision, because such officers head agencies having the technical expertise and institutional competence that Congress intended the ultimate decisionmaker to possess." Id. at 489 (footnote omitted).

In this case, Congress has in fact "constitutionally conclude[d] that some statutory responsibilities should be carried out by particular officers without the President's revision," and has done so precisely because "such officers head agencies having the technical expertise and institutional competence that Congress intended the ultimate decisionmaker to possess." Id. OMB's intervention in OSHA's EtO rulemaking plainly contravened that constitutionally appropriate conclusion. In these circumstances, Justice Jackson's famous statement in Youngstown Sheet and Tube Co. v. Sawyer is particularly appropriate:

> "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting on the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."

343 U.S. 579, 637-38 (1952) (Jackson, J., concurring) (footnote omitted). OMB's actions here cannot survive that kind of scrutiny.

RESOURCE CONSERVATION & RECOVERY ACT (RCRA)

Rule	Deadline	Authority for OMB Review	Date Submitted to OMB	Date Published in Federal Register
Permitting standards for hazardous waste land disposal facilities	April 28, 1978 (S, F) July 15, 1982 (J, F)	EO, PRA	June 3, 1982 (F)	July 26, 1982 (F)
Listing of chlorinated dioxins as hazardous waste	February 8, 1985 (S, F)	EO	February 25, 1983 October 23, 1984 (F)	April 4, 1983 (P) January 14, 1985 (F)
Permitting standards for underground hazardous waste tanks	March 1, 1985 (S, F)	EO, PRA	March 1, 1985 (P)	June 26, 1985 (P)
Land disposal ban scheduling rule	November 8, 1987 (S, F)	EO	March 28, 1985 (P)	May 28, 1985 (P)
Notification requirements for owners of underground storage tanks	November 8, 1985 (S, F)	EO, PRA	April 26, 1985 (P)	May 28, 1985 (P)
Recycled paper procurement guidelines	May 7, 1985 (S, F)	EO, PRA	February 4, 1985 (P)	April 9, 1985 (P)
Standards for burning of hazardous waste for energy recovery	November 8, 1987 (S, F)	EO, PRA	October 2, 1984 (P)	January 11, 1985 (P)

Rule	Deadline	Authority for OMB Review	Date Submitted to OMB	Date Published in Federal Register
Standards for small quantity generators	March 31, 1986 (S, F)	EO, PRA	June 24, 1985 (P)	August 1, 1985 (P)
Listing of used oil as a hazardous waste	November 8, 1985 (S, P) November 8, 1986 (S, F)	EO	August 14, 1985 (P)	Not yet published (P)
Standards for hazardous used oil which is recycled	November 8, 1986 (S, F)	EO, PRA	August 14, 1985 (P)	Not yet published (P)
Mining waste exclusion reinterpretation	September 30, 1985 (J, P) September 30, 1986 (J, F)	EO	August 2, 1985 (P)	Not yet published (P)
Double liner requirements	November 8, 1986 (S, F)	EO	July 11, 1985 (P)	Not yet published (P)

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COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION & LIABILITY ACT (CERCLA)

Rule	Deadline	Authority for OMB Review	Date Submitted to OMB	Date Published in Federal Register
National Contingency Plan	June 9, 1981 (S, F) March 12, 1982 (J, P) July 16, 1982 (J, F)	EO	February 8, 1982 (P) July 1, 1982 (F)	March 12, 1982 (P) July 16, 1982 (F)
Natural resource damage claims regulations	February 28, 1985 (J, P) November 30, 1985 (J, F)	EO, PRA	January 29, 1985 (P)	March 8, 1985 (P)
National Priorities List (NPL)	June 9, 1981 (S, F)	EO	August 19, 1983 (F)	September 8, 1983 (F)
Revisions to NPL	annually (S, F)	EO		
Update #1			August 19, 1983 (P)	September 8, 1983 (P)
San Gabriel			March 30, 1984 (F)	May 8, 1984 (F)
Other sites			September 7, 1984 (F)	September 21, 1984 (F
Update #2			September 20, 1984 (P)	October 15, 1984 (P)
New Jersey Radium Sites			January 7, 1985 (F)	February 14, 1985 (F)
Lansdowne			June 20, 1985 (F)	Not yet published (F)
Update #3			March 1, 1985 (P)	April 10, 1985 (P)
Update #4			July 31, 1985 (P)	Not yet published (P)

TOXIC SUBSTANCES CONTROL ACT (TSCA)

Rule	Deadline	Authority for OMB Review	Date Submitted to OMB	Date Published in Federal Register
Dichloromethane Test Rule	April 10, 1979 (S) May 1981 (J) 1/	EO, PRA	May 11, 1981 (P)	June 5, 1981 (P)
Nitrobenzene Test Rule	October 5, 1978 (S) May 1981 (J) 1/	EO, PRA	May 11, 1981 (P)	June 5, 1981 (P)
1,1,1-Trichloroethane Test Rule	April 10, 1979 (S) May 1981 (J) 1/	EO, PRA	May 11, 1981 (P)	June 5, 1981 (P)
Diethylenetriamine Test Rule	April 24, 1982 (S)	EO, PRA	April 8, 1982 (P)	April 29, 1982 (P)
Biphenyl Test Rule	May 10, 1983 (S)	EO, PRA	April 7, 1983 (P)	May 23, 1983 (P)
Ethyltoluene and Trimethylbenzene Test Rule	May 10, 1983 (S)	EO, PRA	April 12, 1983 (P)	May 23, 1983 (P)
Mesityl Oxide Test Rule	May 1980 (S) 1983 (J) 1/	EO, PRA	April 7, 1983 (P)	July 5, 1983 (P)
Cresols Test Rule	October 5, 1978 (S) 1983 (J) 1/	EO, PRA	April 7, 1983 (P)	July 11, 1983 (P)
Hexafluoropropylene Oxide Test Rule	April 1979 (S) 1983 (J) 1/	EO, PRA	November 8, 1983 (P)	December 30, 1983 (

1/ THE COURT ORDER IMPOSING THESE DEADLINES REQUIRED ONLY THAT EPA EITHER INITIATE RULEMAKING UNDER TSCA SECTION 4(
OR PROVIDE REASONS FOR NOT INITIATING SUCH ACTION.

Rule	Deadline	Authority for OMB Review	Date Submitted to OMB	Date Published in Federal Register
Quinone Test Rule	December 7, 1980 (S) 1983 (J) 1/	EO, PRA	November 29, 1983 (P)	January 4, 1984 (P)
Hydroquinone Test Rule	December 7, 1980 1983 (J) 1/	EO, PRA	November 29, 1983 (P)	January 4, 1984 (P)
Propylene Oxide Test Rule	October 1978 (S) 1983 (J) 1/	EO, PRA	November 16, 1983 (P)	January 4, 1984 (P)
1,2-Dichloropropane Test Rule	October 1980 (S) 1983 (J) 1/	EO, PRA	November 29, 1983 (P)	January 6, 1984 (P)
Chlorinated Benzenes Test Rule	October 1978 (S) October 1979 (S) 1983 (J) 1/	EO, PRA	December 1, 1983 (P)	January 13, 1984 (P)
Oleylamine Test Rule	November 25, 1984 (S)	EO, PRA	October 15, 1984 (P)	November 19, 1984 (P)
Bisphenol A Test Rule	May 8, 1985 (S)	EO, PRA	April 10, 1985 (P)	May 17, 1985 (P)
Ethylhexanoic Aid Test Rule	May 8, 1985 (S)	EO, PRA	April 11, 1985 (P)	May 17, 1985 (P)
1,1,1-Trichloroethane Test Rule	July 1985 (J, P)	EO, PRA	July 8, 1985 (P)	August 7, 1985 (P)
Benzyl Butyl Phthalate Test Rule	October 1985 (J) 2/	EO, PRA	August 16, 1985 (P)	September 6, 1985 (P)

1/ The court order imposing these deadlines required only that EPA either initiate rulemaking under TSCA section 4(a) or provide reasons for not initiating such action.

2/ The deadline imposed under this court order required that the Agency either issue a proposed rule under TSCA section 4(a) or issue a decision not to require testing.

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RULE	DEADLINE	AUTHORITY FOR OMB REVIEW	DATE SUBMITTED TO OMB	FEDERAL REGISTER
USE OF POLYCHLORINATED BIPHENYLS (PCBs) IN ELECTRICAL EQUIPMENT	AUGUST 19, 1982 (J, F)	EO, PRA EO, PRA	APRIL 13, 1982 (P) AUGUST 3, 1982 (F)	APRIL 22, 1982 (P) AUGUST 25, 1982 (F)
USE OF PCBs IN CLOSED AND CONTROLLED WASTE MANUFACTURING PROCESSES	OCTOBER 13, 1982 (J, F)	EO, PRA EO, PRA	APRIL 26, 1982 (P) SEPEMBER 9, 1982 (F)	JUNE 8, 1982 (P) OCTOBER 21, 1982 (F)
UNCONTROLLED PCBs	DECEMBER 1, 1983 (J, P) JULY 1, 1984 (J, F)	EO, PRA EO, PRA	OCTOBER 26, 1983 (P) MAY 15, 1984 (F)	DECEMBER 8, 1983 (P) JULY 10, 1984 (F)
MODIFICATION OF DEFINITION OF "TOTALLY ENCLOSED MANNER" FOR PCB ACTIVITIES	JULY 15, 1984 (J, P) NOVEMBER 1, 1984 (J, F)	EO, PRA EO, PRA	JUNE 22, 1984 (P) OCTOBER 5, 1984 (F)	JULY 23, 1984 (P) NOVEMBER 8, 1984 (F)
PCBs IN ELECTRICAL TRANSFORMERS	OCTOBER 1, 1984 (J, P) JULY 1, 1985 (J, F)	EO, PRA EO, PRA	AUGUST 13, 1984 (P) MAY 10, 1985 (F)	OCTOBER 11, 1984 (P) JULY 17, 1985 (F)
PROHIBITION OF NITRITES IN METALWORKING FLUIDS	JANUARY 24, 1984 (S)	EO	DECEMBER 30, 1983 (P)	JANUARY 23, 1984 (P) 3/
TRIETHANOLAMINE SALT OF A SUBSTITUTED ORGANIC ACID RESTRICTIONS ON USE IN METALWORKING FLUIDS	JUNE 14, 1984 (S)	EO	MAY 4, 1984 (P)	JUNE 14, 1984 (P) 3/
MIXED MONO AND DIAMIDES OF AN ORGANIC ACID RESTRICTIONS ON USE IN METALWORKING FLUIDS	SEPTEMBER 21, 1984 (S)	EO	AUGUST 9, 1984 (P)	SEPTEMBER 20, 1984 (P)

3/ THESE ACTIONS WERE ISSUED AS IMMEDIATELY EFFECTIVE PROPOSED RULES PURSUANT TO THE AUTHORITY OF TSCA SECTION 5(F). IMMEDIATELY EFFECTIVE PROPOSED RULES UNDER SECTION 5(F) MUST BE ISSUED WITHIN THE TIME FRAMES FOR PREMANUFACTURE NOTIFICATION SPECIFIED IN SECTIONS 5(A) AND (C).

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT (FIFRA)

RULE	DEADLINE	AUTHORITY FOR OMB REVIEW	DATE SUBMITTED TO OMB	DATE PUBLISHED IN FEDERAL REGISTER
SPECIAL REVIEW PROCEDURES	MARCH 19, 1985 (J,P)	EO	SEPTEMBER 21, 1984 (P)	MARCH 27, 1985 (P)
REGISTRATION STANDARDS	MARCH 19, 1985 (J,P)	EO	FEBRUARY 4, 1985 (P)	MARCH 27, 1985 (P)

CLEAN WATER ACT

Rule	Deadline	Authority for OMB Review	Date Submitted to OMB	Date Published in Federal Register
	Statutory Deadlines: BPT - October 18, 1983 (S,F) BAT - July 1, 1980 (S,F) PSES - April 18, 1973 (S,P) July 17, 1973 (S,F) NSPS - January 17, 1974 (S,P)* May 17, 1974 (S,F)* PSNS - Sames as NSPS (S,P/F)* * This date applies to all industrial categories listed in the Clean Water Act. Statutory deadline to propose all other categories is one year after category included on new source list; statutory deadline to promilgate these latter standards is 120 days after proposal.			

CLEAN WATER ACT

Rule	Deadline	Authority for OMB Review	Dated Submitted to OMB	Date Published in Federal Register
Aluminum Forming	November, 1982 (J, P) September, 1983 (J, F)	EO, PRA	October 5, 1982 (P) September 21, 1983 (F)	November 22, 1982 (P) October 24, 1983 (F)
Battery Manufacturing	October, 1982 (J, P) January, 1984 (J, F)	EO	September 2, 1982 (P) January 26, 1984 (F)	November 10, 1982 (P) March 9, 1984 (F)
Coal Mining	December, 1980 (J, P) September, 1982 (J, F)	EO, PRA	May 4, 1981 (P) August 31, 1982 (F)	May 29, 1981 (P) October 13, 1982 (F)
Coil Coating (Phase I)	November, 1982 (J, F)	EO, PRA	October 7, 1982 (F)	December 1, 1982 (F)
Coil Coating (Can Making)	January, 1983 (J, P) October, 1983 (J, F)	EO, PRA	January 19, 1983 (P) October 21, 1983 (F)	February 10, 1983 (P) November 17, 1983 (F)
Copper Forming	October, 1982 (J, P) July, 1983 (J, F)	EO	October 13, 1982 (P) July 14, 1983 (F)	November 12, 1982 (August 15, 1983 (F)
Electric & Electronic Components (Phase I)	August, 1982 (J, P) March, 1983 (J, F)	EO, PRA	June 4, 1982 (P) March 18, 1983 (F)	August 24, 1982 (P) April 8, 1983 (F)
Electric & Electronic Components (Phase II)	February, 1983 (J, P) November, 1983 (J, F)	EO	February 1, 1983 (P) November 14, 1983 (F)	March 9, 1983 (P) December 14, 1983 (F
Foundries	October, 1982 (J, P) June, 1985 (J, F)	EO	September 29, 1982 (P) September 11, 1985 (F)	November 15, 1982 (P Not signed by Administrator yet

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CLEAN WATER ACT

RULE	DEADLINE	AUTHORITY FOR OMB REVIEW	DATE SUBMITTED TO OMB	DATE PUBLISHED IN FEDERAL REGISTER
INORGANIC CHEMICALS (PHASE I)	APRIL, 1980 (J, F)	EO	MARCH 17, 1982 (F)	JUNE 29, 1982 (F)
INORGANIC CHEMICALS (PHASE II)	SEPTEMBER, 1983 (J, P) JUNE, 1984 (J, F)	EO	SEPTEMBER 16, 1983 (P) JUNE 20, 1984 (F)	OCTOBER 25, 1983 (P) AUGUST 22, 1984 (F)
IRON & STEEL	MAY, 1980 (J, F)	EO	JANUARY 13, 1982 (F)	MAY 27, 1982 (F)
LEATHER TANNING & FINISHING	NOVEMBER, 1982 (J, F)	EO, PRA	OCTOBER 14, 1982 (F)	NOVEMBER 23, 1982 (F)
METAL FINISHING	AUGUST, 1982 (J, P) JUNE, 1983 (J, F)	EO, PRA	JUNE 16, 1982 (P) JUNE 15, 1983 (F)	AUGUST 31, 1982 (P) JULY 15, 1983 (F)
NONFERROUS MANUFACTURING (PHASE I)	JANUARY, 1983 (J, P) JANUARY, 1984 (J, F)	EO	JANUARY 19, 1983 (P) JANUARY 26, 1984 (F)	FEBRUARY 17, 1983 (P) MARCH 8, 1984 (F)
NONFERROUS MANUFACTURING (PHASE II)	FEBRUARY, 1984 (J, P) JULY, 1985 (J, F)	EO	APRIL 18, 1984 (P) JULY 26, 1985 (F)	JUNE 27, 1984 (P) NOT PUBLISHED YET
NONFERROUS METALS FORMING	JANUARY, 1984 (J, P) JUNE, 1985 (J, F)	EO	JANUARY 23, 1984 (P) JUNE 28, 1985 (F)	MARCH 5, 1984 (P) AUGUST 23, 1985 (F)
OFFSHORE OIL & GAS EXTRACTION	NOVEMBER, 1981 (J, P) 120 DAYS AFTER PROPOSAL OR OTHER ALTERNATIVE DATE (J, F) (NSPS ONLY)	EO	FEBRUARY 19, 1985 (P)	AUGUST 26, 1985 (P)

CLEAN WATER ACT

RULE	DEADLINE	AUTHORITY FOR OMB REVIEW	DATE SUBMITTED TO OMB	DATE PUBLISHED IN FEDERAL REGISTER
ORE MINING	MAY, 1982 (J, P) NOVEMBER, 1982 (J, F)	EO, PRA	MARCH 4, 1982 (P) OCTOBER 15, 1982 (F)	JUNE 14, 1982 (P) DECEMBER 3, 1982 (F)
ORGANIC CHEMICALS/ PLASTICS & SYNTHETIC FIBERS	FEBRUARY, 1983 (J, P)	EO	FEBRUARY 8, 1983 (P)	MARCH 21, 1983 (P)
PESTICIDES	NOVEMBER, 1982 (J, P) AUGUST, 1985 (J, F)	EO	SEPTEMBER 28, 1982 (P) AUGUST 2, 1985 (F)	NOVEMBER 30, 1982 (P) NOT YET PUBLISHED
PETROLEUM REFINING	SEPTEMBER, 1982 (J, F)	EO	SEPTEMBER 1, 1982 (F)	OCTOBER 18, 1982 (F)
PHARMACEUTICALS	NOVEMBER, 1982 (J, P) SEPTEMBER, 1983 ((J, F)	EO, PRA	OCTOBER 13, 1982 (P) SEPTEMBER 26, 1983 (F)	NOVEMBER 26, 1982 (P) OCTOBER 27, 1983 (F)
PLASTICS MOLDING & FORMING (PHASE I)	JANUARY, 1984 (J, P) NOVEMBER, 1984 (J, F)	EO	JANUARY 20, 1984 (P) NOVEMBER 9, 1984 (F)	FEBRUARY 15, 1984 (P) DECEMBER 17, 1984 (F)
PORCELAIN ENAMELING	NOVEMBER, 1982 (J, F)	EO, PRA	OCTOBER 12, 1982 (F)	NOVEMBER 24, 1982 (F)

CLEAN WATER ACT

Rule	Deadline	Authority for OMB Review	Date Submitted to OMB	Date Published in Federal Register
Pulp & Paper	October, 1982 (J, F)	EO	October 5, 1982 (F)	November 18, 1982 (F)
Steam Electric	November, 1982 (J, F)	EO, PRA	October 27, 1982 (F)	November 19, 1982 (F)
Textile Mills	August, 1982 (J, F)	EO	July 28, 1982 (F)	September 2, 1982 (F)
Placer Mining	November 6, 1976 (S, P) (NSPS)	EO	September 3, 1985 (P)	Not yet signed by Administrator

CLEAN WATER ACT

RULE	DEADLINE	OMB AUTHORITY	DATE TO OMB	DATE PUBLISHED
Idaho Water Quality Standards	Dec. 4, 1980(S, P) March 6, 1981 (S, F)	EO	Feb. 5, 1985 (P)	Aug. 20, 1985(P)

SAFE DRINKING WATER ACT

RULE	DEADLINE	OMB AUTHORITY	DATE SUBMITTED TO OMB	DATE PUBLISHED IN FR
UIC Direct Implementation Phase II-Final Rule	October 29, 1984 (Judicial) (date for signature of Administrator; deadline met)	EO, PRA	October 1, 1984	November 15, 1984
UIC Direct Implementation Phase II-Proposed Rule	May 11, 1984 (Judicial)	EO, PRA	April 20, 1984	May 11, 1984
UIC Direct Implementation Phase I-Final Rule	March 27, 1984 (Judicial) (date for signature of Administrator; deadline met)	EO, PRA	February 21, 1984	May 11, 1984
UIC Direct Implementation Phase I-Proposed Rule	September 2, 1983 (Judicial)	EO, PRA	June 27, 1983	September 2, 1983
Texas UIC Program Approval--SDWA §1422	November 28, 1981	EO	December 14, 1981	January 6, 1982
Oklahoma UIC Program Approval--SDWA §1425	August 15, 1981	EO	November 10, 1981	December 2, 1981

SAFE DRINKING WATER ACT

RULE	DEADLINE	OMB AUTHORITY	DATE TO OMB	DATE PUBLISHED
National Revised Primary Drinking Water Regulation - Volatile organic Chemicals - RMCL	June 30, 1977 (S, P) September 30, 1977 (S,F)	EO	February 8, 1984 (P) June 2, 1985 (F)	June 12, 1984 (P) (Not yet Published) (F)
National Revised Primary Drinking Water Regulation - Fluoride - RMCL	June 30, 1977 (S,P) April 30, 1985* (J,P)	EO	March 20, 1985 (P)	May 14, 1985 (P)
National Revised Primary Drinking Water Regulation - Inorganic, Volatile organics, microbials - RMCL	June 30, 1977 (S,P)	EO	April 15, 1985 (P)	(Not yet Published)
National Revised Primary Drinking Water Regulation - Volatile organic Chemicals - MCL	September 30, 1977 (S,P)	EO PRA	June 2, 1985 (P)	(Not yet Published)

*Deadline is for Administrator signature

ATTACHMENT G

P = PROPOSED RULE
F = FINAL RULE
I = INTERIM FINAL RULE
S = STATUTORY DEADLINE
J = JUDICIAL DEADLINE
EO = EXECUTIVE ORDER 12291
PRA = PAPERWORK REDUCTION ACT

Materials on
OMB delays of regs
Subject to statutory
or judicial
deadlines

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54-520 0 - 86 - 10

CLEAN AIR ACT

RULE	DEADLINE	AUTHORITY FOR OMB REVIEW	DATE SUBMITTED TO OMB	DATE PUBLISHED IN FEDERAL REGISTER
NATIONAL AMBIENT AIR QUALITY STANDARDS (NAAQS) FOR CARBON MONOXIDE	DECEMBER 31, 1980 (S, F) SEPTEMBER 13, 1985 (J, F)	EO	JULY 15, 1985 (F)	APPROX. SEPTEMBER 13, 1985 (SIGNED SEPTEMBER 5, 1985) (F)
NAAQS FOR NITROGEN OXIDES	DECEMBER 31, 1980 (S, F)	EO	JUNE 22, 1983 (P)	FEBRUARY 23, 1984, 49 FR 6866 (P) ✓
			NOVEMBER 20, 1984 (F)	JUNE 19, 1985, 50 FR 25532 (F) ✓
NAAQS FOR PARTICULATE MATTER	DECEMBER 31, 1980 (S, F)	EO	DECEMBER 14, 1983 (P)	MARCH 20, 1984 49 FR 10408 (P) ✓
NAAQS FOR HYDROCARBONS (REVOCATION)	DECEMBER 31, 1980 (S, F)	EO	APRIL 18, 1981 (P)	MAY 8, 1981, 46 FR 25655 (P) ✓
			MARCH 8, 1982 (F)	JANUARY 5, 1983, 48 FR 628 (F) ✓

Rule	Deadline	Authority for OMB Review	Date Submitted to OMB	Date Published in Federal Register
Alabama lead SIP	November 1, 1983 (J, P) May 1, 1984 (J, F)	EO	October 19, 1983 (P) April 10, 1984 (F)	November 7, 1983 (P) May 2, 1984 (F)
Arizona lead SIP (Except for NSR)	August 1, 1980 (S, F)	EO	July 20, 1981 (P) Final not submitted to OMB	September 29, 1980 (P) June 30, 1982 (F) ✓
Florida lead SIP	January 3, 1984 (J, P) August 1, 1984 (J, F)	EO	Proposal not submitted to OMB February 4, 1985 (RP)* Final Not yet submitted	December 21, 1983 (P) February 21, 1985 (RP)* Final Not yet published
Georgia lead SIP	April 18, 1981 (S, F)	EO	October 21, 1981 (F)	November 5, 1981 (F)
Idaho lead FIP (Shoshone County)	July 2, 1984 (J, P) January 31, 1985 (J, F) August 30, 1985 (J, F)	EO	May 8, 1984 (P) January 23, 1985 (F) August 12, 1985 (F)	July 6, 1984 (P) February 7, 1985 (F) September 10, 1985 (F)
Illinois lead SIP (Granite City area)	January 3, 1984 (J, P) August 1, 1984 (J, F)	EO	December 6, 1983 (P) Final not sent to OMB	December 29, 1983 (P) July 24, 1984 (F)
Indiana lead SIP	January 3, 1984 (J, P) August 1, 1984 (J, F)	EO	December 6, 1983 (P) Not yet submitted	December 29, 1983 (P) Not yet published

* RP - Reproposed Rule

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RULE	DEADLINE	AUTHORITY FOR OMB REVIEW	DATE SUBMITTED TO OMB	DATE PUBLISHED IN FEDERAL REGISTER
KANSAS LEAD SIP	JUNE 17, 1981 (S, F)	EO	JUNE 11, 1981 (P) SEPTEMBER 18, 1981 (F)	JUNE 26, 1981 (P) OCTOBER 22, 1981 (F)
MAINE LEAD SIP	MARCH 5, 1981 (S, F)	EO	MAY 21, 1981 (P) JULY 29, 1981 (F)	JUNE 8, 1981 (P) AUGUST 27, 1981 (F) ✓
MARYLAND LEAD SIP	FEBRUARY 23, 1981 (S, F)	EO	NOVEMBER 5, 1981 (P) FINAL NOT SUBMITTED TO OMB	NOVEMBER 17, 1981 (P) ✓ FEBRUARY 23, 1982 (F) ✓
MISSOURI LEAD SIP	JANUARY 2, 1981 (S, F)	EO	APRIL 7, 1981 (F)	APRIL 27, 1981 (F)
NEBRASKA LEAD SIP (OMAHA AREA)	JANUARY 3, 1984 (J, P) AUGUST 1, 1984 (J, F)	EO	DECEMBER 6, 1983 (P) FINAL NOT SENT TO OMB	DECEMBER 29, 1983 (P) JANUARY 31, 1985 (F) [illegible]
NEBRASKA LEAD SIP (STATEWIDE EXCEPT FOR OMAHA)	NOVEMBER 1, 1983 (J, F)	EO	OCTOBER 20, 1983 (F)	NOVEMBER 29, 1983 (F)
NEW HAMPSHIRE LEAD SIP	AUGUST 15, 1980 (S, F)	EO	APRIL 16, 1981 (P) JUNE 23, 1981 (F)	MAY 4, 1981 (P) JULY 15, 1981 (F) ✓
PENNSYLVANIA LEAD SIP (STATEWIDE EXCEPT FOR ALLEGHENY COUNTY, PHILADELPHIA AND AREA AROUND THREE SMELTERS)	JANUARY 30, 1983 (S, F)	EO	MARCH 17, 1983 (P) FINAL NOT SUBMITTED TO OMB	APRIL 11, 1983 (P) 16th OCTOBER 12, 1983 (F)

RULE	DEADLINE	AUTHORITY FOR OMB REVIEW	DATE SUBMITTED TO OMB	DATE PUBLISHED IN FEDERAL REGISTER
TENNESSEE LEAD SIP (STATEWIDE EXCEPT FOR CERTAIN AREAS)	JANUARY 3, 1984 (J, P) AUGUST 1, 1984 (J, F)	EO	NOT SUBMITTED TO OMB JULY 6, 1984 (F)	DECEMBER 21, 1983 (P) AUGUST 7, 1984 (F)
TENNESSEE LEAD SIP (MEMPHIS/SHELBY COUNTY)	JANUARY 3, 1984 (J, P) AUGUST 1, 1984 (J, F)	EO	NOT SUBMITTED TO OMB JULY 13, 1984 (F)	DECEMBER 21, 1983 (P) AUGUST 8, 1984 (F)
TEXAS LEAD SIP (DALLAS)	JANUARY 3, 1984 (J, P) AUGUST 1, 1984 (J, F)	EO	NOT SUBMITTED TO OMB JULY 6, 1984 (F)	DECEMBER 29, 1983 (P) AUGUST 15, 1984 (F)
TEXAS LEAD SIP (EL PASO)	JANUARY 3, 1984 (J, P) AUGUST 1, 1984 (J, F)	EO	NOT SUBMITTED TO OMB JULY 11, 1984 (F)	DECEMBER 29, 1983 (P) AUGUST 13, 1984 (F)
TEXAS LEAD FIP (EL PASO)	OCTOBER 1, 1984 (P)	EO	DECEMBER 12, 1984 (P)	JANUARY 4, 1985 (P)
UTAH LEAD SIP	JULY 11, 1980 (S, F)	EO	APRIL 30, 1981 (P) FINAL NOT SUBMITTED TO OMB	MAY 18, 1981 (P) JUNE 30, 1982 (F)

Rule	Deadline	Authority for OMB Review	Date Submitted to OMB	Date Published in Federal Register
Polymer Manufacture	August 7, 1982 (S,F)	EO, PRA	November 2, 1983 (P) May 3, 1984 (P) April 25, 1985 (P)	Not yet published
Rubber Tire Manufacture	August 7, 1982 (S,F)	EO, PRA	May 24, 1982 (P) April 8, 1985 (F)	January 20, 1983 (P) ✓
Beverage Can Containers	August 7, 1982 (S,F)	EO, PRA	December 16, 1981 (F) May 20, 1982 (F) July 19, 1982 (F)	November 26, 1980 (P) ✓ August 25, 1983 (F) ✓
Lead Acid Battery Manufacture	April 13, 1980 (S,F)	EO, PRA	June 16, 1981 (F)	January 14, 1980 (P) ✓ April 16, 1982 (F)
Synthetic Fiber Manuf.	August 7, 1982 (S,F)	EO, PRA	September 2, 1982 (P) December 16, 1983 (F)	November 23, 1982 (P) ✓ April 5, 1984 (F)
Equipment Leaks from Petroleum Refineries	August 7, 1982 (S,F)	EO, PRA	October 22, 1982 (P) January 26, 1984 (F)	January 4, 1983 (P) ✓ May 30, 1984 (F)
Bulk Gasoline Terminals	August 7, 1982 (S,F)	EO, PRA	November 4, 1982 (F)	December 17, 1980 (P) ✓ August 18, 1983 (F) ✓
SOCMI Air Oxidation Streams	August 7, 1982 (S,F)	EO, PRA	May 14, 1983 (P)	October 21, 1983 (P) ✓
SOCMI Distillation Units	August 7, 1982 (S,F)	EO, PRA	September 7, 1983 (P)	December 30, 1983 (P) ✓
Metallic Minerals Processing	August 7, 1982 (S,F)	EO, PRA	December 10, 1981 (P) October 20, 1983 (F)	August 24, 1982 (P) February 21, 1984 (F) ✓

Rule	Deadline	Authority for OMB Review	Date Submitted to OMB	Date Published in Federal Register
SOCMI Equipment Leaks	August 7, 1982 (S,F)	EO, PRA	March 18, 1983 (F)	January 5, 1981 (P) October 18, 1983 (F)
Metal Furniture Coating	February 26, 1981 (S,F)	EO, PRA	May 13, 1982 (F)	November 28, 1980 (P) October 29, 1982 (F)
Large Appliance Coating	August 7, 1982 (S,F)	EO, PRA	May 20, 1982 (F)	December 24, 1980 (P) October 27, 1982 (F)
Coal Preparation Plants	January 15, 1980 (S,F)	EO, PRA	March 26, 1981 (F)	April 14, 1981 (F)
Asphalt Processing	August 7, 1982 (S,F)	EO, PRA	May 8, 1981 (P) May 21, 1982 (F)	November 18, 1980 (P) August 6, 1982 (F)
Phosphate Rock Plants	August 7, 1982 (S,F)	EO, PRA	June 18, 1981 (F) also Feb. 11, 1982 (F)	April 16, 1982 (F)
Volatile Organic Liquid Storage Vessels	August 7, 1982 (S,F)	EO, PRA	June 19, 1981 (P) August 25, 1983 (F) also April 25, 1984 (F)	July 23, 1984 (P) Not yet done (F)
Stationary Internal Combustion Engines	August 7, 1982 (S,F)	EO, PRA	June 29, 1981 (F) also Nov. 3, 1982 (F)	Not yet done (F)
Sodium Carbonate Plants	August 7, 1982 (S,F)	EO, PRA	August 28, 1981 (F)	September 22, 1981 (F)
Flexible Vinyl Coating and Printing	August 7, 1982 (S,F)	EO, PRA	May 4, 1982 (P) July 13, 1983 (F) also Feb. 17, 1984 (F)	January 18, 1983 (P) June 29, 1984 (F)

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Rule	Deadline	Authority for OMB Review	Date Submitted to OMB	Date Published in Federal Register
Publication Rotogravure	August 7, 1982 (S,F)	EO, PRA	May 19, 1982 (F)	November 8, 1982 (F)
Metal Coil Coating	August 7, 1982 (S,F)	EO, PRA	May 17, 1981 (F)	November 1, 1982 (F)
Petroleum Dry Cleaners	August 7, 1982 (S,F)	EO, PRA	July 8, 1982 (P) Dec. 20, 1983 (F) also July 24, 1984 (F)	December 14, 1982 (P) September 21, 1984 (F)
Non-metallic Minerals	August 7, 1982 (S,F)	EO, PRA	March 23, 1983 (P) April 23, 1985 (F)	August 31, 1983 (P) August 1, 1985 (F)
Pressure-sensitive Tapes & Labels	August 7, 1982 (S,F)	EO, PRA	May 18, 1983 (F)	October 18, 1983 (F)
Claus Sulfur Recovery Plants	March 15, 1982 (S,F)	EO, PRA	August 25, 1983 (F)	December 28, 1983 (F)
Onshore Natural Gas Processing - VOC	August 7, 1982 (S,F)	EO, PRA	September 2, 1983 (P) March 5, 1985 (F)	January 20, 1984 (P) June 24, 1985 (F)
Kraft Pulp Mills	February 23, 1982 (S,F)	EO, PRA	September 2, 1983 (F)	January 19, 1984 (F)
Wool Fiberglass Insulation Mfg.	August 7, 1982 (S,F)	EO, PRA	November 2, 1983 (P) December 20, 1984 (F)	February 7, 1984 (P) February 25, 1985 (F)

RULE	DEADLINE	AUTHORITY FOR OMB REVIEW	DATE SUBMITTED TO OMB	DATE PUBLISHED IN FEDERAL REGISTER
INDUSTRIAL BOILERS (PM, NOx)	AUGUST 7, 1982 (S,F) NOVEMBER 1, 1986 (J,F)	EO, PRA	DECEMBER 16, 1983 (P) ALSO FEB. 15, 1984 (P)	JUNE 19, 1984 (P)
GRAIN ELEVATORS	AUGUST 3, 1982 (S,F)	EO, PRA	FEBRUARY 6, 1984 (F)	MARCH 27, 1984 (F)
SECONDARY BRASS AND BRONZE	JUNE 19, 1983 (S,F)	EO, PRA	APRIL 5, 1984 (F)	MAY 23, 1984 (F)
PORTLAND CEMENT PLANTS	OCTOBER 22, 1983 (S,F)	EO, PRA	MARCH 7, 1985 (F)	
SEWAGE TREATMENT PLANTS	NOVEMBER 27, 1983 (S,F)	EO, PRA	MARCH 19, 1985 (F)	

Rule	Deadline	Authority for OMB Review	Date Submitted to OMB	Date Published in Federal Register
Benzene Standards		EO, PRA		
Fugitive Emissions	July 4, 1981 (S,F) May 23, 1984 (J,F)		Unknown (F)	June 6, 1984 (F)
Withdrawal of Maleic Anhydride, EBS, and Storage Vessels	March 1, 1984 (J,P)		February 6, 1984 (P)	March 6, 1984 (P)
	May 23, 1984 (J,F)		May 3, 1984 (F)	June 6, 1984 (F)
Coke Byproduct	May 23, 1984 (J,P)		March 6, 1984 (P)	June 6, 1984 (P)
Arsenic Standards	December 2, 1980 (S,P) July 11, 1983 (J,P) January 7, 1984 (S,F)	EO, PRA	June 28, 1983 (P), June 29, 1984 (F), also February 19, 1985(F)	July 20, 1983 (P) ✓

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Rule	Deadline	Authority for OMB Review	Date Submitted to OMB	Date Published in Federal Register
Radionuclides Standards	June 1980 (S,P) December 1980 (S,F)	EO, PRA	March 14, 1983	April 6, 1983
	March 30, 1983 (J,P)		No written submission	October 31, 1984
Withdrawal	October 23, 1984 (J,F)		January 8, 1985	February 6, 1985
Three Categories	January 10, 1985 (J,F)		February 7, 1985 (P) April 3, 1985 (F)	February 21, 1985 (P) April 17, 1985
Uranium Mines	April 10, 1984 (J,F)			

Rule	Deadline	Authority for OMB Review	Date Submitted to OMB	Date Published in Federal Register
PUMs Decision	August 7, 1978 (S,F) August 2, 1984 (J,F)*	EO	December 22, 1983 (P) July 16, 1984 (F)	February 13, 1984 (P) ✓ August 8, 1984 (F)
Cadmium Decision	August 7, 1978 (S,F)	EO	August 15, 1985 (P)	Not yet done ✓
Intermittent Control Systems	February 7, 1978	EO	March 19, 1984	September 24, 1984 (P)

*Deadline was for Administrator's signature, not for publication.

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Rule	Deadline	Authority for OMB Review	Date Submitted to OMB	Date Published in Federal Register
Stack Height Regulations	October 3, 1981 (J,P*)	EO	August 31, 1981 (P)	October 7, 1981 (P)
	February 7, 1978 (S,F) January 31, 1982 (J,F*)	EO	December 30, 1981 (F)	February 8, 1982 (F)
		EO	October 2, 1984 (P)	November 9, 1984 (P)
	June 27, 1985 (J,F*)	EO	June 4, 1985 (F)	July 8, 1984 (F)

*Deadline was for Administrator's signature, not for promulgation.

Rule	Deadline	Authority for OMB Review	Date Submitted to OMB	Date Published in Federal Register
STRIP MINES, inclusion in PSD and nonattainment new source review	October 20, 1984 (J)(P)	OE	September 26, 1984 (P)	October 26, 1984 (P)
DISAPPROVAL of Michigan fugitive dust regulations	April 30, 1985 (J)(P) August 1, 1985 (J)F)	OE OE	May 10, 1985 (P) Juy 30, 1985 (F)	May 30, 1985 (P) August 20, 1985 (F)
VISIBILITY, new source review and monitoring	October 20, 1984 (J)(P) July 3, 1985 (J)(F)	OE OE	September 12, 1984 (P) June 6, 1985 (F)	October 23, 1984(P) July 12, 1985 (F)
DISAPPROVAL of Indiana TSP SIP for Lake County	January 31, 1985 (J)(P)	OE	January 22, 1985 (P)	January 31, 1985 (P)

Rule	Deadline	Authority for OMB Review	Date Submitted to OMB	Date Published in Federal Register
NOx Standards for Light-duty Trucks and Heavy duty Engines	By 1981 Model Year (S, F) October 15, 1984 (J, P) March 15, 1985 (J, F)	EO, PRA	August 14, 1984 (P) February 14, 2985 (F)	October 15, 1984 (P) (49 FR 40258) March 15, 1985 (F) (50 FR 10606)
Particulate Standards for Heavy-duty Diesel Engines	By 1981 Model Year (S, F) October 15, 1984 (J, P) March 15, 1985 (J, F)	EO, PRA	August 14, 1984 (P) February 14, 1985 (F)	October 15, 1984 (P) (49 FR 40258) March 15, 1985 (F) (50 FR 10606)
"Generic" Nonconformance Penalty Rule for Heavy-duty Vehicles	August 7, 1978 (S, F) March 15, 1985 (J, P) August 31, 1985 (J, F)	EO	January 18, 1985 (P) July 19, 1985 (F)	March 6, 1985 (P) (50 FR 9204) August 30, 1985 (F) (50 FR 35374)
"Specific" Nonconformance Penalties for Heavy-duty Vehicles	August 7, 1978 (S, F) August 31, 1985 (J, P) December 31, 1985 (J, F)	EO, PRA	July 25, 1985 (P)	August 30, 1985 (P) (50 FR 35402)

ATOMIC ENERGY ACT

RULE	DEADLINE	AUTHORITY FOR OMB REVIEW	DATE SUBMITTED TO OMB	DATE PUBLISHED IN FEDERAL REGISTER
URANIUM MILL TAILINGS (INACTIVE)	OCTOBER 1, 1982 (S,F)	EO	JUNE 10, 1982 RESUBMITTED SEP. 16, 1982	JAN. 5, 1983 (F) (SIGNED DEC. 15, 1982)
URANIUM MILL TAILINGS (ACTIVE)	OCTOBER 31, 1982 (S,P) OCTOBER 1, 1983 (S,F)	EO	MARCH 8, 1983 AUGUST 31, 1983	APRIL 29, 1983 (P) OCTOBER 7, 1983 (F) (SIGNED SEP. 30, 1983)
HIGH LEVEL RADIATION WASTE	AUGUST 15, 1985 (J,F)	EO	JULY 24, 1985	NOT YET PRINTED SIGNED AUG. 15, 1985

98TH CONGRESS
2d Session

COMMITTEE PRINT

COMMITTEE
PRINT 98-AA

INVESTIGATION

OF THE

ENVIRONMENTAL PROTECTION AGENCY

REPORT

ON THE

PRESIDENT'S CLAIM OF EXECUTIVE PRIVILEGE OVER EPA DOCUMENTS, ABUSES IN THE SUPERFUND PROGRAM, AND OTHER MATTERS

BY THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON ENERGY AND COMMERCE

U.S. HOUSE OF REPRESENTATIVES

Together With Minority Views

AUGUST 1984

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1984

2. Interference by the Office of Management and Budget in EPA Rulemaking

a. Background

During the 97th Congress, the Subcommittee on Oversight and Investigations conducted several hearings concerning the role of the Office of Management and Budget (OMB) pursuant to Executive Order 12291.[677] Executive Order 12291, which was issued in February, 1981, requires Executive departments and agencies to submit proposed regulations to OMB's Office of Information and Regulatory Affairs (OIRA) before publishing such rules in the Federal Register.[678]

If a proposed rule is "major,"[679] the Agency must submit the rule, together with a preliminary Regulatory Impact Analysis (RIA), at least 60 days before publication. If OMB finds that the Agency's Regulatory Impact Analysis is deficient, it may order a delay in publication of the proposed rule.[680]

Similarly, final Regulatory Impact Analyses must be prepared and submitted to OMB at least 30 days prior to publication of the proposed rule as final.[681] OMB may order an Agency to refrain from publishing a final rule and final Regulatory Impact Analysis until it has submitted its comments and the Agency has responded. The Order does not impose any time limits on OMB to complete its review and submit comments to either preliminary or final RIA's.[682]

Early Subcommittee hearings and investigations concerning Executive Order 12291 highlighted the fact that the new re-

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[676] (continued) Chairman Dingell that "possible perjury" involving Dr. Hernandez' testimony remained an open matter.

[677] Role of OMB in Regulation: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. (1981) (hereinafter cited as OMB Regulatory Hearings).

[678] Exec. Order No. 12291, 3 C.F.R. § 127 (1982), reprinted in 5 U.S.C. §601.

[679] The Executive Order defines "major rule" as "any regulation that is likely to result in: (1) An annual effect on the economy of $100 million or more; (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) Significant adverse effects on competition, employment, investment productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets." Id.

view process established by the Order was subject to serious abuse. The hearings revealed the lack of safeguards against OMB acting as a conduit for the comments of regulated industries on proposed regulations, the potential for undue influence through ex parte contacts, the absence of any defined standards for the cost-benefit analysis contemplated by the Executive Order, and the lack of any meaningful time constraints for the OMB review.[683] A Congressional Research Service study, prepared for the Subcommittee's hearings in 1981, observed:

> The Order ... makes available a valuable and vulnerable early point of access to the agency decisionmaking process for non-governmental and political interests. This may be its implicit purpose. The process is therefore redolent with the possibilities for secret, undisclosed, and unreviewable communications and contacts by parties interested in influencing the substance of agency action. The Order provides no safeguards whatsoever to protect the integrity of the policymaking process or the interest of the public from such influences. On its face, then, the Order deprives interested persons, now and in the future, of their right to the most essential elements of fair treatment embodied in the notion of due process. ...[684]

b. "Serious Abuses" by the Office of Management and Budget

On September 27, 1983, John E. Daniel testified before the Subcommittee about the role of the Office of Management and Budget in reviewing EPA regulations under Executive Order 12291. Mr. Daniel provided examples derived from his experience as EPA Chief of Staff between 1981 and 1983.

Under questioning from Congressman Albert Gore, former Chief of Staff Daniel revealed a pervasive pattern of interference by the Office of Management and Budget in EPA rulemaking:

> Mr. Gore. Mr. Daniel, ... Over the past couple of years, we have had a number of concerns about the

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[680] Id. See also, OMB Regulatory Hearings, pp. 13, 18-25, 211-220.

[681] Id.

[682] Id.

[683] OMB Regulatory Hearings, pp. 4, 53-57, 102-38.

[684] M. Rosenberg, Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised By Executive Order 12291, 97th Cong., 1st Sess. 54 (1981).

regulatory review process established by Executive Order 12291, and it has been suggested that this Executive [O]rder and the regulatory review process it establishes often act as a conduit for the expression of views on the part of industry affected by a proposed regulation.

Did your experience as EPA Administrator Burford's Chief of Staff show this suggestion to be true?

* * *

Mr. Daniel. Yes, sir, Mr. Gore. There were a number of instances when regulations that we sent to OMB were the subject of communications with OMB, in which it seemed that the feedback we were getting from them was more analysis from the intended regulatee than from OMB itself.

Mr. Gore. Could you give examples of that?

Mr. Daniel. One of the better examples that I could give is a set of regs in which I was a part of briefings by our staff. They were effluent guidelines under the Clean Water Act that applied to the iron and steel industry.

During the consideration of those regulations, we got a number of comments from OMB, analyses from OMB, that were of such a particularized technical nature, and I am talking about in an engineering sense, that they would have had to have come from someone other than the staff of OMB itself.

There was one critical issue in those regs that dealt with something called ... central treatment facilities at existing iron and steel plants. ... [B]oth the volume and the specificity of comments that we got on that would have had to come from the regulatee.

Also, there were a number of occasions when I and others of the Agency would get calls from persons associated with some of the regulated industries, in which they had knowledge of existence of the regs, some specifics in the regs at OMB that would have to--the communication would have had to come through that means, I believe.

Mr. Gore. So, you had the strong impression that the Office of Management and Budget was communicating through a back channel with the industry intended to be affected by the regulations, giving the industry information about what was proposed--contrary to the law--and then allowing themselves to be used as a conduit to EPA for comments by the affected industry. Is that correct?

Mr. Daniel. That is correct, sir.

Mr. Gore. Did OMB ever seem to be a conduit for promoting the views of other Government agencies that disagreed with EPA?

Mr. Daniel. On occasion. [T]here are some Federal agencies and Federal facilities that are in effect regulated by EPA ... [A][n] example of that is energy facilities that were owned or operated by the Department of Energy ... in which the OMB comments really were prepared in toto by DOE.

Mr. Gore. So when EPA, on occasion, sought to force the Federal Government to clean up its act at the Department of Energy facilities, you would get comments from the Office of Management and Budget which seemed to be reflecting the objections of the Department of Energy to what you were trying to do to get them to clean up?

Mr. Daniel. Yes, sir.

Mr. Gore. It also has been suggested that often OMB opposition to a proposed rule is not based on the cost-effectiveness principles that are expressed in the Executive [O]rder, but seem at times to be based solely on philosophical or political considerations.

Did you in your experience as Chief of Staff find evidence showing that that was the case?

Mr. Daniel. Yes, sir. I guess there was one primary example in which I was involved that regarded water quality standards that were being proposed by EPA under the Clean Water Act. We were in the process of trying to reform the process by which a State agency proposed water quality standards, to get them adopted by EPA.

For years, there had been in those standards a provision dealing with nondegradation of water quality in receiving streams, and although in my experience in working Alabama and Ohio for State governments there, it had never been a substantial hurdle for people to deal with as permitees and regulatees.

Nonetheless, there was immense pressure brought by OMB on the Agency to change the nondegradation provision, and it was purely philosophical, because there was no cost analyses, cost-effectiveness studies or anything else that I think would have borne out any basis for changing that part of the reg.

But we wanted the regs out. Other reforms in there were very valuable to our State and Federal partnership and we wanted the regulations published. So as a part of the price for getting the regs out, we did change the nondegradation language in the proposal, and it turned out that that change ended up being a lightning rod in the regs that I think probably--I am not entirely familiar with the reg now, but probably impeded the reforms that the States asked for in the first instance.

Mr. Gore. Of course, the procedures established by the Congress in the law are designed to prevent this sort of thing, but if OMB has a back-door channel to affected industries and others who don't want to participate in the open process arriving at rulemaking, then the procedures get warped.

Another problem that this subcommittee has long had with the OMB procedure involves the application of cost-benefit analysis. Several people have suggested to us that when OMB applies a cost-benefit analysis under the procedure, it really doesn't look at the benefits.

Principally, it looks at the costs, and ignores the benefits. Have you had any experiences which suggest to you that that is their approach?

Mr. Daniel. Well, there [is] ... one thing about the process I think that answers your question, and that is that when we were deregulating, that is to say that we were lessening the regulatory burden in a set of proposals, the RIA's and other types of analyses that ordinarily would be required but were not imposed on those proposals, and there are regulations which I think that under the kind of scrutiny that you are talking about, would show that retaining a regulation as it was, maybe even strengthening it, would provide overall greater benefits than a revised regulation.

Mr. Gore. But in your experience, they looked principally at the costs and not at the benefits, correct?

Mr. Daniel. That is correct.

Mr. Gore. It has been suggested that OMB, through the Executive [O]rder review process, has even attempted to direct a particular regulatory action, thereby displacing the Agency head's discretionary authority.

Did your experience show this suggestion to be true?

Mr. Daniel. Yes, sir, in fact, in one set of regs that I think was most uniformly criticized by both the Congress and the public, was what we were doing with review of the lead phasedown regulations.

Those regulations had been cited by the Vice President for Regulatory Relief Task Froce as being the subject of review, and the Agency's attitude was to review those regulations.

We were under tremendous pressure from OMB not just to have [an] advance notice of proposed rulemaking that would lead to such a review, but that we cite as our preferred choice that the regs be rescinded.

And eventually we had to include recision of the regulation as a part of the advance notice of proposed rulemaking, even though that was not--

Mr. Gore. So, you were more or less ordered to do that, even though EPA did not feel that was the correct choice?

Mr. Daniel. That is correct.

Mr. Gore. Did you personally receive any calls relative to these matters?

Mr. Daniel. On that one, I am sure I had some conversations with some OMB officials from time to time, but it wasn't until later as we were trying to get the final regulation out that I had some dealings with OMB.

But the Agency, the Agency staff had numerous conversations with OMB.

Mr. Gore. Before going to that, let me ask you, in those cases in which EPA took some action contrary to the wishes of OMB, what were the consequences?

Mr. Daniel. Well, usually there were veiled threats of what would happen next. On one occasion, Mr. Gore, I was a participant with the Administrator in issuing some regulations over OMB's objections. There were regulations that had been ordered by court. The Agency--the Administrator was under court order to issue by a certain deadline. When they had not received the requisite OMB approval under the Executive [O]rder, she nonetheless signed the regulations and issued them.

Late that evening I received a call from an OMB official in which--

Mr. Gore. Who?

Mr. Daniel. Mr. Jim Tozzi, who worked with Mr. DeMuth at OMB at that time.

But he said to me words to this effect that there was a price to pay for doing what we had done, and that we hadn't begun to pay.

Mr. Gore. Is that right?

Mr. Daniel. So, that was one instance, I think, or something other than the veiled threat that we had had before.

Mr. Gore. ... Mr. Chairman. If I might just conclude by saying this: Now that we have the curtain pulled back, we are able to see what has really been going on at EPA and the Office of Management and Budget. I am shocked to find that OMB has been ordering EPA to take actions that it felt was not in the best interests of the environment or the public simply because of back-door communications with industries that complained about the potential effect of regulations designed to protect the public.

* * *

Mr. Gore. ... During Ms. Burford's tenure as the Administrator of EPA, did her views as to the nature, purpose, and value of the OMB review process change?

Mr. Daniel. Yes, it did. When we first arrived over at EPA in 1981, her attitude was that of participating with other members of the administration as a team. She continued to remind us of that and to remind us of our obligation ... as being appointees of the President and his administration, to cooperate with other agencies, and to settle our differences through the processes that had been set up. And she often used staff meetings to remind us of that and to remind us of our obligation to work with other team members.

But as time went on, she took a much more independent stance, particularly with respect to OMB and the review process over there. As time went on, there were more occasions in which she personally intervened in the disagreements that were going on among staff at EPA and OMB. And, in fact, later on she encouraged the staff to stand fast on positions they had taken with respect to regulations that were sent over to OMB and not to compromise out the Agency's principles and its own interest in the process of getting a regulation released from OMB.

Mr. Gore. Well, that is very interesting. You know the regulatory process at EPA and other agencies is set up to provide fair input from all sides involved in a dispute, and if one side is able to go through a back door and affect the process outside of the public's view in an unfair way, then that is something that is clearly not in the public interest and something that evidently has been happening on a regular basis.

Now, do you know of any occasions in which the Office of Management and Budget gave to parties affected by a proposed rule copies of the the proposal before it was printed in the Federal Register?

Mr. Daniel. Mr. Gore, I know of but one example of when that occurred that I think evidences that point of your inquiry. ... I think it was in late 1981--we had sent to OMB a set of regulations dealing with ... radioactive waste ... [S]hortly after we had sent those over to OMB, our Office of Air, Noise, and Radiation received a call from a gentleman that I think was from the General Electric Corp. asking for additional time to comment on the regulation. It turned out that after the staff member questioned him, that he was providing comments to OMB on the regulations we had sent over to them for clearance, and he had a copy of the regulations and he was providing comments to OMB.

There was some problem that he wasn't able to get the comments in to them as timely as they requested. But that is the only instance where I think that the evidence is pretty clear.

Mr. Gore. ... [I]t was almost accidental that ... an industry that was going to be affected by a proposed regulation had been given copies of it before it had even been printed in the Federal Register?

Mr. Daniel. That is right, sir.

Mr. Gore. Do you know of any instances in which OMB directed EPA to take regulatory action which the Agency believed was contrary to a specific statute?

Mr. Daniel. Well, there were--the word "directed" may be a little stronger. But in terms of the guidance that they gave us, it was clear there were instances where our statutes confined us to a certain type of rulemaking that would not allow us to take into account, for instance, economics or economic feasiblity or technological feasibility.

Probably the best example of that was in the ambient air quality standards under the Clean Air Act where the statute has been ... in setting the ambient air quality standards, it was health based alone without any consideration of cost.

During the time that I was at EPA, we were in the process of trying to develop revisions to the ambient air standards for particulate matter, in which the OMB had taken a strong involvement, in terms of trying to shape the standard. [OMB] kept urging upon us consideration of the costs through certain types of analyses that really were not permitted in terms of making the ultimate decision under the statute.

The other example I would cite to you, Mr. Gore, is with respect to something called uranium mill tailings. There are out West, and I think maybe in a few places here in the East, piles of uranium mill tailings that have been there for years. There are places where, in fact, residences have been built on these. And a special statute was passed by the Congress to provide for an orderly process for indication of health standards for cleanup level, and then ultimately for a process by which the Department of Energy, in cooperation with the States, would clean up the sites and to try to protect the health of persons that were around them.

EPA's role in this is purely one of setting the health standard for a person that would be exposed to the tailings pile. In terms of the costs that were involved, ultimately it would be the Department of Energy that would have paid for those through proposed funds. So the check, the cost-benefit analysis of this, was in the hands of the Congress. Our job is just to set the health standards.

But we were urged to set different kinds of standards that would have been based on the cost of doing these cleanups of these mill tailings piles that were out of line with what the statute told us, at least on the basis of advice we were getting from our lawyers at EPA, as to the constraints on the Agency to set the standards.

Mr. Gore. Did you tell them that that would be a violation of the law?

Mr. Daniel. We did. There was a lot of urgency in getting the standards out, a lot of interest out West in getting these piles cleaned up. Eventually the agreement we struck with OMB in order to get them to approve the publication of the standards was that we would propose on that same day a change in the very standards adopted that day.

We adopted one standard saying everything is fine and it is based on the statute. At the same time, we proposed to change the very standard that we adopted the same day. That was the price.

Mr. Gore. You talked about OMB directing you to take action with respect to the lead standard, the Clean Air Act, the Clean Water Act, high level nuclear waste, and uranium mill tailings, among other issues. Does OMB have a staff of environmental experts to review health threats and consider all of the other matters affected in these areas?

Mr. Daniel. I don't believe so, Mr. Gore. You would need to ask them that, but I think our experience was that we were mainly dealing with people who were able to make economic analyses and be able to review some of the economic analyses that we sent over to them.

Mr. Gore. And there were evidently in constant communication with the large corporations that were potentially affected by some of your proposals, so the inescapable conclusion is that they just sat over there and acted as a back-door channel to let the corporations affected hotwire the regulatory process and get the result that they wanted.

I mean, isn't that essentially what they were doing?

Mr. Daniel. I think you have correctly characterized it, yes.

Mr. Gore. In what form did they communicate with you? Did they give you legal briefs saying this is the reason why we are ordering you to do this or that? Was it a written or oral communication?

Mr. Daniel. Almost always oral. Occasionally there would be written communication, but those were the exceptions.

Mr. Gore. Did you ever request them to put their views in writing?

Mr. Daniel. Occasionally we did and on at least one instance the Administrator herself, in the lead phasedown regulation, insisted that at least some points that OMB were making be put in writing because of the intense public interest in what we were doing. She wished to have their position in writing because she

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found it incredulous that with the public and congressional demand actually for the tightening of the regulations--

Mr. Gore. Did they put them in writing?

Mr. Daniel. They did.

Mr. Gore. That was the only time?

Mr. Daniel. That is the only time I know of in which she demanded something be put in writing.

Mr. Gore. Did OMB's review process result in extended delays of the promulgation of regulations and, if so, did those delays result in failure to meet statutory deadlines?

Mr. Daniel. In the radioactive waste [case] that I mentioned before, the delay was over a year. It seems they were sent to OMB Christmas Eve Day of 1981 and we finally got release on the last day of 1982.

I remember that because our radiation staff had a birthday party for this particular regulation Christmas Eve to celebrate its year of residence at OMB. But I would point out too that one area that particularly concerned the Administrator that we never were able to get resolved was under the Clean Air Act. The Clean Air Act Amendments of 1977 required EPA to establish new source performance standards for a whole list of new categories of sources of air pollution.

The statute prescribed a timetable, 25 percent of the regulations had to be issued within a certain number of days after the enactment of those amendments in 1977, 50 percent by another date, and 100 percent, I think, had to be enacted by August 1982.

We had new source performance standards, mainly for, I think it was sources of volatile organic compounds, that were at OMB interminably, and I don't know that they have been released to this day, mainly because of the disagreement about how to fashion the standard and how it would apply to the sources.

Mr. Gore. That is what we refer to on this subcommittee as the regulatory black hole that this review procedure sets up.

Mr. Daniel. I might mention that the Administrator, when she first came into office in 1981, was particularly perplexed by the number of court orders that were under other statutes that she inherited; that the Agency was ordered to issue, for instance, guidelines on the Clean Air Act.

She wanted to get the performance standards out because she didn't want to invite a lawsuit under the Clean Air Act, so she pushed the staff to get those out.

I don't know whether they have been issued to this day.

Mr. Gore. Thank you Mr. Daniel, for your testimony.

Prepared Statement of Senator Mark Andrews

As you are aware I represent the State of North Dakota. It is a predominantly rural area comprised of many small businessmen and farmers who rely heavily on the United States Postal Service. However, I think that you will find that many of us who serve in the United States Senate represent groups of individuals who will be severely harmed if your proposal to eliminate Private Express Statutes is effectuated.

In the Spring? Summer edition of The CATO Journal you argue that fears of the cost of mail delivery in rural areas rising are exaggerated and cite airline and trucking deregulation as examples of businesses maintaining service to small communities in a deregulated environment. I am somewhat puzzled by your comparison of costs versus availability of these services. Are you aware that it costs more to fly from Washington, D.C. to Fargo, North Dakota than it does to fly from Washington, D.C. to Los Angeles?

I would like to know how individuals in out-of-the-way rural areas and those living in economically undesirable locations will be served under your proposal; and

If private enterprise refuses to deliver to unprofitable locations do you believe the United States Postal Service should assume that unprofitable task?

TESTIMONY OF
SENATOR QUENTIN N. BURDICK
BEFORE THE
SENATE GOVERNMENTAL AFFAIRS COMMITTEE
ON THE NOMINATION OF JAMES C. MILLER III TO BE
DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET

SEPTEMBER 24, 1985

I would like to add my views to the others the committee will be receiving as it considers the nomination of James C. Miller III to be the new Director of the Office of Management and Budget.

It has come to my attention that Mr. Miller has publicly stated his desire to see the Postal Service's monopoly on the carriage of first class letter mail revoked. As a Senator from a predominantly rural state, I find Mr. Miller's remarks very unsettling. His proposal goes far beyond anything suggested by the Reagan Administration to date.

I have serious reservations about Mr. Miller's confirmation as a result of his statement urging that the Congress revoke this monopoly. I cannot endorse such a proposal.

It has been the business of the U.S. government for more than 200 years to assure prompt, reliable and efficient mail delivery services to all patrons in all areas. The logic upon which this system was based is no less valid today. Mr. Miller claims that letting private enterprise compete would tend to lower average postal costs overall. He makes no mention, of course, as to how and at what cost mail would reach rural areas. Too, it is important to note that the Postal Service was designed to provide a service, not for the purpose of showing a profit.

It is conceivable that in large, concentrated population centers, costs could be held down by private firms. However, no one can convince me that the same would be true for the vast rural expanses of our country. Private firms, unlike the Postal Service, would be interested in making a profit first. And that means obtaining the best routes. People in rural areas, such as my state of North Dakota, would be placed in a position of accepting whatever mail service was offered to them at whatever price the market would bear.

Universal postal service at a uniform price is what our founding fathers mandated. And with good reason. To do otherwise can only cause mass confusion. Can you imagine the number of volumes that will be necessary to list the postage rates for each little town across America? What a nightmare it would create for agencies such as the Internal Revenue Service. This department has contact with nearly every household in the country. I wonder what their views would be on a proposal that could have them looking up postage rates for most households in the country...not to mention looking up what private firm to call on to deliver the mail to specific areas.

The only alternative to different rates for rural areas is a system whereby the government guarantees mail delivery to those places private companies leave behind. I seriously question whether this Congress is ready to appropriate the kind of money necessary to support these unprofitable postal services if the Private Express Statutes are repealed. As a Senator who has been actively involved over the years in securing money for the Postal Service, I think the answer to this question is quite clear.

What we are really talking about here is deregulating the Postal Service. We have already seen what deregulation of the airline industry has meant for North Dakota. Right now it is cheaper to fly from New York to Los Angeles than it is from Bismarck to Minneapolis. I have every reason to believe that the same situation would develop with our mail service.

A thorough examination of the issue of whether these statutes should be repealed can only lead one to the conclusion that such a plan is foolhardy. For this reason, I have serious concerns about a Budget Director who considers this the best course of action.

STATEMENT OF

REPRESENTATIVE GUY V. MOLINARI
14TH DISTRICT, NEW YORK

BEFORE THE

SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

ON

THE NOMINATION OF
JAMES C. MILLER III
AS DIRECTOR OF THE
OFFICE OF MANAGEMENT AND BUDGET

SEPTEMBER 24, 1985

Mr. Chairman, I thank you for the opportunity to make a statement at these confirmation hearings. I would like to address what I believe is a critically important issue: that is the Office of Management and Budget's subtle but decisive takeover of the decisionmaking processes of our government agencies to the point where it is now the determinative, though unaccountable, factor in agency policy decisions.

Unlike four and one half years ago, when the last OMB Director was confirmed, this nominee stands to command an apparatus whose far-reaching operations are shrouded in secrecy and unbounded by statutory constraints. OMB's continued unrestrained taking of the decisionmaking authority of our regulatory agencies, power granted to them alone by Congress, is a danger to the Congress and our system of government. Today, right now, we face a serious threat to the separation of powers principle which has served as a cornerstone of our government. The concentration of power in OMB comes at Congress' expense. Under the current mode of operation of OMB, our ability to oversight the agencies to which we have delegated specific duties and given authority to carry out our specific mandatas is eroding.

We in the Congress, and specifically this committee acting for the Congress, will, I hope, see the necessity of confronting this dangerous trend during these confirmation hearings. OMB is institutionalizing a dramatic shift in power within our government. It effects not only how our government operates now but also how it will operate in decades ahead. This is not a partisan issue. It is an institutional problem which we must face. We should heed closely

Mr. Justice Jackson's admonition in the Steel Seizure Case (Youngstown Steel and Tube Company v. Sawyer):

> Presidential claim to power at once so conslusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitution.

I see a great urgency that Congress not let this situation continue or progress further. I am concerned that Congress not be seen as acquiescing to OMB's actions. If we do not strongly challenge OMB on the issue now, I believe we run the risk of being seen as legitimizing OMB's assumption of authority.

There is no constitutional or statutory basis for the OMB that now exists. Regardless of who is nominated as Director, we must know the nominee's intentions with regard to OMB's future role in agency policymaking. Yet, I believe there is cause for somewhat greater concern for OMB's future course because of the prior role the nominee played in creating OMB's policy control system and enforcing it as OMB's Administrator of the Office of Information and Regulatory Affairs in 1981.

As this Committee well knows, the Constitution vests all legislative power in the Congress. In enacting legislation Congress frequently delegates some of that legislative power to specific agencies in the form of rulemaking authority. Congress delegates such authority to agencies relying on the particular agency's expertise. I emphasize that the authority is delegated to specific agencies, not to the executive branch as a whole and certainly not to OMB. To ensure that regulations are consistent with Congressional intent, the Congress provides substantive criteria to guide the agencies. To ensure that the public has a say in rulemaking and the agencies can be held accountable both to Congress and the courts, Congress mandates specific procedural rulemaking procedures emphasizing openess and reasoned decisions.

The constitutional and statuatory basis for our regulatory process neither mandates nor recognizes a determinative role for OMB. Yet, this is precisely the type of role OMB now plays. Largely through Executive Order 12,291, issued in February 1981, OMB has established an unprecedented mechanism for centralized presidential management of agency rulemaking, with authority to intervene into and direct the process at all stages. Under the order, all proposed rules of all executive agencies must be submitted to OMB's Office of Information and Regulatory Affairs (OIRA) before publication in the Federal Register. If an agency deems a proposed rule minor, it must be submitted to OMB at least 10 days prior to publication. If within that period, however, OMB determines a proposed rule major, the agency must prepare a preliminary Regulatory Impact Analysis (RIA) assessing the rule's costs and benefits for review. RIA's are significant since under the Order no regulatory action may be undertaken unless "taking into account effected industries [and] the condition of the national economy ", the potential benefits to society outweigh potential costs, and net benefits are at a maximum.

OMB expanded on its 12,291 authority with the issuance of Executive Order 12,498 in January. It is just as astonishing and dangerous as the first order. Under Executive Order 12,498 agencies each year are required to establish a regulatory agenda which is subject to review by OMB.

The agenda must detail every agency regulatory activity "planned or underway", including the "development or documents that may influence, anticipate, or could lead to the commencement of rulemaking proceedings at a later date." The annual agency submissions must "explain how they are consistent with the Administration's regulatory principles." If OMB decides that a proposed action is not consistent with those principles, it may not be pursued by an agency. If during the year an agency wants to undertake an activity that was not part of the approved regulatory program, it must seek OMB approval.

OMB both uses and abuses these executive orders as it desires. It uses them to keep track of potential rulemaking actions and get the relevant documentation from the agencies. But from this point on OMB acts as if the particular issue is under its primary control and it alone will determine what will become policy and what will not.

These two executive orders give OMB de facto veto power over agency rulemaking activity. And I repeat again that neither order finds its source in any specific Congressional enactment or provisions of the Constitution. In fact they contravene them.

Cases have now been documented of OMB forcing agencies to violate statuatorily-prescribed or court-ordered deadlines; pressuring agency officials to modify or abandon technical, scientific and policy judgments; imposing decisionmaking considerations forbidden by Congress; engaging in secret, off-the-record meetings with industry lobbyists and transmitting their views to agency decisionmakers without identification; and failing to ensure that its input is refected in the public docket of an agency's rulemaking.

OMB uses cost-benefit analysis as its main standard of judgement. There is a reason for this. This type of analysis can be used for any type of political end and can be skewed any way one wants. In one case, OSHA determined that a proposed OSHA concrete worker protection rule would cost $1.0 million dollars per worker to implement and its valued each life at $3.5 million. OMB stated that $1.0 million was a better value for a life, using a theory that workers with risky jobs valued their lives less than those who hold safer jobs--or the riskier one's job the less one's life is valued. Conveniently, under OMB's new calculations costs now outweigh benefits under the proposed rule.

The way OMB has reshaped the rulemaking process, agencies are now forced to be responsive and responsible to OMB, not to the Congress (or even their own better judgements). No one can deny that OMB has the power over agencies to get its way in rulemaking. With its power to control agency budget requests, to raise or lower agency personnel ceilings, to regulate the manner by which agencies gather information, and to censor testimony before Congress, OMB is an overwhelming force on other agencies. It has easily worked its will regarding the regulatory executive orders and we cannot expect the agencies to stand up to OMB in defense of their legal authority. As Mr. Miller pointedly remarked during his tenure as OMB's regulatory head, "You know, if you're the toughest kid on the block, most kids won't pick a fight with you. The executive order establishes things quite clearly."

When you see what OMB intrusion and control has meant in specific cases the impact and gravity of the situation should be clear.

One very serious case involves the National Priorities List of Superfund sites. Earlier this year OMB directed EPA to remove the Silver Creek, Utah mining waste site from the proposed NPL update. The site received a score high enough to place it on the NPL and had been internally approved by EPA for inclusion on the list. Yet, EPA at the last minute capitulated to OMB and removed the site prior to announcing the NPL update in April.

It has become obvious that OMB pays particular attention to proposed actions on the environment, public health and worker protection. Its not hard to see how easy it is for OMB to kill such regulations when one of the guidelines it states agencies must follow reads:

> Regulations that seek to reduce health or safety risks should be based upon scientific risk-assesment procedures, and should address risks that are real and significant rather than hypothetical or remote.

I am sure that that is not how Congress sees it.

It also should be emphasized that in cases where deregulatory actions are proposed, OMB takes a completely different tack. In these cases, the regulatory impact analysis imposed on new rules is considered unnecessary. As Mr. Miller stated in a 1981 interview, "If OMB ... were convinced on the basis of evidence, however sparse, that such a reduction would occur, a waiver would be granted immediately.

Mr. Chairman, to give an idea of just how unrestrained and unaccountable OMB has made itself, let me quote a few passages from the Justice Department legal memorandum on E.O. 12,291 which OMB uses to justify its authority. You can see how OMB disregards even the Justice Department's own opinion supporting the executive order. One section of the memorandum states:

> Nevertheless, it is clear that the President's exercise of supervisory powers must conform to legislation enacted by Congress. In issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress.

But OMB right now recognizes few Congressional boundaries. In fact, it has been reported that OMB has not even answered two letters sent by a group of Senators asking for and explanation for delays in drinking water standards.

At another point the Justice Department memo states:

> This Office has often taken the position that the President may consult with those having statutory decisionmaking responsibilities, and may require them to consider statutorily relevant matters that he deems appropriate, as long as the President does not divest the officer of ultimate statutory authority.

Who can now claim that our agency heads are not being divested of their ultimate statutory authority on a regular and consistent basis? Even the Justice Department's legal document supporting E.O. 12,291, which is based on very questionable legal grounds to begin with, means little to OMB and has long since been rendered meaningless by OMB's repeated actions violating it. Yet, we still hear OMB's spokesmen pointing to it to justify its actions.

In a recent court filing involving an EPA rulemaking, the Justice Department argued that agency heads are not bound to obey OMB on regulatory review. This argument won't make much difference at OMB. The entire situation shows an OMB which believes it is accountable to no one.

OMB is vigorously pursuing its arrogation of power. Last month we all received a document entitled "The Regulatory Program of the United State Government," issued by OMB. The very issuance of this document by and through OMB is alarming. It is a vivid indication f just how OMB sees itself and where it places itself in our government.

Let me quote one passage from the document's introduction:

> On a goverment wide basis, the executive establishes and explains its spending priorities in the annual fiscal budget. Now under Executive Order No. 12,498, the Executive will establish and explain its regulatory priorities, and like the fiscal budget, will review them again next year.

Although it is obvious why OMB wants to make the analogy to the budget, there are a number of good reasons showing the falsity of this analogy:

1. The President's role in the budget process is not the final one--Congress must pass appropriations legislation. Yet OMB's veto over regulatory activities can have a final effect.

2. Under the budget process, the President and OMB have their roles and authority, defined by statute. Nevertheless, until 1921, the agency dealt directly with Congress over their appropriation--the President historically was cut out of the process.

3. The budget process operates as a political process without objective standards. Normally, regulatory decisions must be made pursuant to standards set forth in a statute.

4. There is an ideal of "reasoned decisionmaking" that has been subject to judicial enforcement in the rulesmaking context. This has made regulatory decisionmaking less overtly political than the budget process where no such restraints are recognized.

In conclusion Mr. Chairman, the implications of our permitting this practice to continue are enormous. These are permanent changes being made in our system of government. They will not only be used by this President, but by future Presidents as well. These are not just the practices of a particular OMB Director which will depart with him. Through the executive orders the shift of lawmaking power is given permanence. It is not hard to imagine future Presidents, from either party, readily using this system for their own ends.

This is the first new OMB Director nominated since the regulatory executive orders were issued. The confirmation process affords a rare opportunity to open this vital issue up. The Senate cannot be seen as confirming a new Director, no matter who he or she is, to an OMB as the executive currently defines it or to one that acts as this OMB has over the past four and one half years.

I see no acceptable way out of this situation other than for the Congress to strongly assert itself and demand that the system OMB has built which allows it to control agency decisionmaking be dismantled. I do not believe the two court cases currently underway which deal with specific OMB actions based on Executive Order 12,291 hold sufficient likelihood of resulting in decisions which will void the OMB system as a whole. We can get more and more specific in our legislation as to exactly what we want agencies to do in rulemaking but that is not an efficient way to legislate and will likely prove ineffective as well.

We cannot take a nominee's assurances that the executive orders protect Congressional prerogatives. They do not on paper and they have not in practice.

As long as these executive orders remain in force and they are use as they are now, I do not believe that the Congress can be even reasonably confident that its mandates are being faithfully carried out by executive agencies or that we will be able to carry out our oversight responsibilities on agency actions.

I strongly urge the Committee to pursue this issue vigorously at these confirmation hearings. The only legitimate lawmaker under our Constitution is the Congress. It does not share that power with OMB. We must act now, forcefully and directly, to uphold this fundamental principle of our government.

WILLIAM V. ROTH, JR., DELAWARE, CHAIRMAN

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United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510

September 26, 1985

The Honorable William E. Brock
Secretary of Labor
Frances Perkins Building
200 Constitution Avenue N.W.
Washington, D.C. 20210

Attn: Mike Baroody
Assoctant Secretary for Policy

Dear ~~Secretary Brock~~: Bill

Two days ago James C. Miller III appeared before the Senate Governmental Affairs Committee for his confirmation as the next Director of the Office of Management and Budget. At that time I asked him about his views on the Administration's proposed revision of E.O. 11246 which, as you know, requires federal contractors to comply with affirmative action and to keep statistical information on their employment practices.

Mr. Miller responded that (to paraphrase him) he firmly believed in equal opportunity, that he was strongly opposed to any discriminatory employment practices but, that he wanted to underscore his opposition to quotas.

I then directed his attention to that portion of the revised Order which removes any requirement on a government contractor or subcontractor to adopt or attain statistical measures. As I understand it, it is such statistical compilation which has been used by the Secretary of Labor for the past twenty years as evidence to measure progress in fighting discrimination.

At my request, Mr. Miller responded in writing (copy enclosed) on this point saying, in part:

> "...nothing in the proposed executive order would, in fact, preclude the Secretary of Labor from collecting statistics on recruiting, hiring, and/or training practices of government contractors."

My problem with this statement is that the revised Order states:

> "Nor shall any Government contractor or subcontractor be determined to have violated this Order due to a failure to adopt or attain any statistical measures." (Sec. 217) (Copy enclosed.)

BEST COPY AVAILABLE

Although Mr. Miller's written answer by itself is satisfactory as far as it goes, nevertheless, there is still a large unresolved question.

How can you, as Secretary of Labor, effectively collect statistics in order to gauge contractor and subcontractor compliance with non-discriminatory principles if contractors and subcontractors no longer have to compile statistics because of this revised Order?

Even if it is argued that elsewhere in the law, contractors and subcontractors will continue to be required to collect employment statistics, I remain concerned about the justification for, and legal meaning of, the changed provision which I have cited insofar as such changed provision would impact on your ability to enforce affirmative action laws within the scope of your duties as Secretary of Labor.

I realize that you do not comment on draft changes in executive orders. However, I am seeking assurance on the following:

(1) That as Secretary of Labor, you intend to enforce fully all laws within the scope of your statutory duties pertaining to affirmative action; and

(2) That as Secretary of Labor, you consider it necessary that contractors and subcontractors keep an adequate statistical data base as to employment hiring so as to properly enforce the affirmative action laws which are within the scope of your statutory duties.

Sincerely yours,

Thomas F. Eagleton
United States Senator

TFE:kt

U.S. DEPARTMENT OF LABOR
SECRETARY OF LABOR
WASHINGTON, D.C.

September 27, 1985

1985 SEP 27 AM 10 33

The Honorable Thomas F. Eagleton
United States Senate
Washington, D.C. 20510

Dear Tom:

This will respond to the two questions you posed in our conversation and your subsequent letter of the 26th regarding the Department of Labor's enforcement of affirmative action.

As we discussed, the draft document to which you referred has no standing as Administration policy and so you can understand that I do not direct my comments to that draft but to the questions as posed in your letter.

To your first question, of course, my answer is yes, firmly and emphatically. The Department has extensive enforcement responsibility under many different statues. I intend to enforce all of them vigorously, none more so than those which are directed at ensuring equal employment opportunities are guaranteed to all Americans without regard to race, color, religion, sex or national origin.

As to the second question, please be assured that I will maintain all necessary tools of enforcement required for the Secretary of Labor to ensure that any contractor who wishes to do business with the federal government must not only refrain from discriminatory employment practices but must also take effective affirmative action steps. I certainly agree that adequate record-keeping and statistical compilations as to employment hiring are necessary both on the part of contractors and of the Department to properly enforce these requirements.

I hope the above answers your questions satisfactorily.

Very truly yours,

WILLIAM E. BROCK

WEB:bjr

ADA

September 25, 1985

The Honorable William V. Roth, Jr.
Chairman
Senate Governmental Affairs Committee
340 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

On behalf of the 140,000 members of the American Dental Association, I am writing to express our support for James C. Miller III, to be confirmed as the next Director of the Office of Management and Budget.

While it would be fair to state that members of the dental profession have not always agreed with Mr. Miller as Federal Trade Commission Chairman, we have always considered him to be fair, willing to listen and open to discussion.

During his chairmanship at the Commission, I and other representatives of our Association, have met with Mr. Miller on several occasions. We have always found him at these meetings to be knowledgeable on our concerns, straight-forward, and quite simply, a man whose word was reliable.

We believe that a review of his record at the Federal Trade Commission reveals a man who arrived on the scene, took charge, and returned an errant agency to once again live within its statutory parameters.

Prior to his service at the Commission, Mr. Miller distinguished himself as Administrator for Information and Regulatory Affairs, OMB. He was also Executive Director of the Presidential Task Force on Regulatory Relief.

Before his government service, Mr. Miller was recognized as an economist of distinction. He was a resident scholar at the American Enterprise Institute; a senior staff economist with the Council on Economic Advisors; assistant director of the Council on Wage and Price Stability; and associate professor of economics at Texas A & M University.

In short, James C. Miller III has the experience, the expertise, and the leadership qualities that would make him an excellent Director of OMB. Therefore, I urge you to proceed to confirm him in the expeditious manner that he deserves as a candidate of first rate credentials and outstanding character attributes.

Sincerely yours,

Hal M. Christensen
Director
Washington Office

HMC:cs

C/S/E
CITIZENS FOR A
SOUND ECONOMY

No. 1
September 23, 1985

CAPITOL
COMMENT

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IT'S MILLER TIME AT THE OMB

Senate hearings on the nomination of James C. Miller to be director of the Office of Management and Budget (OMB) begin this Tuesday. If confirmed, Miller will enter his new post as a Reagan administration veteran.

Miller's first post with the Reagan administration was at the Office of Management and Budget as its first administrator of the Office of Information and Regulatory Affairs (OIRA). There, Miller reviewed all new executive agency regulations and modifications of old regulations. Concurrently, he was executive director of the Presidential Task Force on Regulatory Relief, President Reagan's spearhead group charged with dismantling regulations deemed cumbersome and inefficient.

In these posts, Miller is credited with removing or preventing implementation of regulations the administration considered most burdensome to business and consumers. Within 60 days, 72 regulations proposed by the Carter administration were postponed or eliminated. The Federal Register, which had grown from a length of 20,000 pages in 1970 to over 87,000 pages in 1980, was cut by one third. The aggregate volume of rulemaking decreased by 45 percent, and the volume of proposed rulemaking declined by almost 50 percent.

The Task Force is credited with saving consumers and taxpayers $150 billion. Miller's key role in these efforts earned him the sobriquet of Ronald Reagan's "Deregulation Czar."

While Miller's achievements at OMB and on the Task Force are remarkable, his most notable accomplishments have come while serving as chairman of the Federal Trade Commission (FTC). Appointed in October, 1981, Miller is the first economist to serve as FTC chairman. Many contend Miller has restored the FTC's reputation after a period of turmoil.

"Before Jim Miller came to the FTC," says Dr. Robert Tollison, leading free market economist and a close colleague of Miller's, "the FTC was out of control. It was trying to regulate everything from cereal to funeral parlors." Prior to Miller's appointment, the Commission had become a bully pulpit for an extremist few. The FTC was losing more than 60 percent of its antitrust decisions on appeal to federal courts. Congress became so dissatisfied with the FTC that it shut the agency down for a day in 1980. Even the Washington Post found fault with the FTC's moralistic attitude and its attempts at social engineering, labeling it America's self-appointed "national nanny."

Jim Miller redirected the FTC with the clearly-defined goal of doing what is right for the consumer. He abolished the commission's per se antitrust policy of suing firms engaging in resale price maintenance (RPM), based on a wealth of data proving that RPM practices lead to better service and information for consumers. He also investigated practices of municipalities which granted cab companies monopoly rights. Such initiatives by Miller broadened competition leading to better quality, lower prices, and an increase in decisionmaking power for citizens.

As an economist, Miller brought to the FTC the tool of cost-benefit analysis. This economic test replaced the "shotgun" approach to regulation which the FTC had taken throughout the 1970's. By weighing costs of regulations against their benefits, Jim Miller's policies freed up resources previously tied down by the necessity of complying with burdensome federal regulations.

The types of unnecessary regulations that Mr. Miller fought are as harmful to the economy as excessive taxation and government spending and invariably reduce competition among businesses. Miller contends: "Competition is far more likely to force business to serve consumers than government directives written by Washington bureaucrats."

Recently, Mr. Miller has raised the ire of the Washington establishment by suggesting that the U.S. Postal Service's monopoly on the delivery of first class mail be ended and the private sector allowed to step in. Those favoring "business as usual" in the postal bureaucracy, which loses $1 million every day, are likely to respond to this novel approach in the same negative way as the powerful National Association of Letter Carriers and the American Postal Workers Union. But, Mr. Miller's idea parallels that of postal rate commissioner John Crutcher who proposed opening up rural service to private bidders. This would result in annual savings of over $5 billion.

At the FTC, Mr. Miller has proven himself to be a true friend of the consumer by moving toward a more competitive economy through reducing government interference in people's economic affairs. At the OMB, Mr. Miller's embrace of the theory of privatization will make him a true friend of the American taxpayer. The efficiency advantages of the private provision of goods and services are well known through a large body of literature, as well as the British experience under Margaret Thatcher, and Jim Miller's willingness to suggest heretofore controversial methods for reducing government spending illustrates his creative approach to combatting the prospect of endless $200 billion deficits. This kind of iconoclastic leadership is exactly the tonic OMB needs to begin getting runaway federal spending under control.

Jeffrey C. Smith
Project Director